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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICHARD L. DUGGER, et al.,

Petitioners,

v.

RAYMOND R. STONE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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293 pp

RESPONSE NOT PRINTED

QUESTION PRESENTED

DOES HITCHCOCK V. DUGGER, 107 S. Ct. 1821, (1987), REPRESENT NEW LAW SUFFICIENT TO SATISFY A REED V. ROSS, 468 U.S. 1, (1984), CAUSE SHOWING, AND IF IT DOES, IS A FINDING OF ACTUAL PREJUDICE NO LONGER NECESSARY UNDER WAINWRIGHT V. SYKES, 433 U.S. 72, (1972)?

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v.

RAYMOND R. STONE,

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

The Petitioners, Richard L. Dugger and Robert A. Butterworth, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals in Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988).

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals panel appears at 837 F.2d 1477 (11th Cir. 1988) and is reprinted in the Appendix hereto, pages A 3-12. Rehearing was denied on September 12, 1988, and the order is reprinted and found in the Appendix pages A 1-2.

The decision of Federal District Court Judge Susan Black dated September 10, 1988, is also reprinted and included in the Appendix pages A 13-100.

The order entered by the trial court imposing the death sentence as well as the transcript of the penalty phase can also be found in the Appendix pages A 156-289. The decision of the Florida Supreme Court upholding the judgment and sentence is reported in Stone v. State, 378 So.2d 768 (Fla. 1979), cert. denied,

Stone v. Florida, 449 U.S. 981 (1988). A 112-147.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals was decided February 5, 1988. Rehearing was denied September 12, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments XIV, VIII, and X of the United States Constitution are involved in the instant cause.

STATEMENT OF THE CASE

Stone was indicted on November 4, 1974, in the Circuit Court of the Eighth Judicial Circuit in and for Union

County, Florida, for the August 23, 1974 first degree murder of Mrs. Jacqueline Smith. He was adjudicated guilty on July 11, 1975; his jury recommended a sentence of death on July 18, 1975, and the trial judge sentenced Stone to death on October 1, 1975.

On direct appeal, Stone argued in Point 5 the following:

> (5) (a-c) The trial judge improperly found as an aggravating factor in imposing sentence that petitioner was "under sentence of imprisonment;" and improperly, along with the jury, failed to credit his purported drug and alcohol intoxication, and abused background, dispositive weight in mitigation.

The Florida Supreme Court denied all relief. Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, Stone v. Florida, 449 U.S. 986 (1980). Appendix pages A 101-147.

The Florida Supreme Court's opinion contains the following factual synopsis:

> On August 22, 1974, the victim, Jacqueline Smith, reported for work at the General Electric Plant. Her hours were from 3:30 P.M. until midnight. She did not return for work and, after searching for her, Marvin Smith, her husband, notified police authorities. Later in the morning her automobile was found parked in a field near her home.
>
> The defendant had been employed by the victim's husband in May, 1974 to assist in the farming of his tobacco crop. At the time of the homicide defendant was staying with the Smiths in their home.
>
> On September 1, 1974, a body was found in the Santa Fe River approximately one-fourth mile west of a bridge. The neck region and head were missing, as well as the left upper extremity. The hand and right upper extremity were also missing. Dr. L.F. Beamer, a pathologist, identified the torso as being that of the victim by virtue of a laminectomy scar and an abnormality of the twelfth rib.

> The defendant was involved in an accident in Missouri when a truck collided with the rear of his vehicle. Defendant was hospitalized and, while in the hospital, Missouri police officials arrested him on August 31, 1974. Florida had lodged a detainer against him because the state won an appeal relating to an earlier criminal conviction for sodomy and Florida officials wished to return him for the purpose of serving the remainder of his sentence.
>
> A Florida officer met defendant in Missouri on September 4, 1974, and returned him to Florida. He was taken to Leon County Jail, then to the Lake Butler Reception and Medical Center for further medical treatment. This medical center is a part of the prison system of Florida.
>
> Defendant was informed that he was a suspect in a murder case. Eventually defendant confessed.

Stone v. State, 378 So.2d 765, 767-768.

The Court rejected Stone's original claim that the jury and the trial had erred in refusing to credit his abused background dispositive weight in mitigation:

The sentence recommendation of the jury was rendered July 18, 1975. Sentence was imposed on October 1, 1975. On August 26th and September 2nd, 1975, defendant's trial counsel forwarded copies of psychiatric reports to the trial court which disclosed that defendant was admitted to the Farmington State Hospital on June 8, 1955, under the alias of "Walter Herron". The case history of defendant included an incident which occurred when he was eleven years of age. At that time he and two other boys bound another child and threw the child into a river where he drowned. The diagnostic report revealed the following:

> Sociopathic youth from a deprived and depraved environment whose basic trust in others is so low that the possibility of an uneventful adjustment is considered very doubtful. He is considered to be of low average intelligence and in good contact with reality; however, his stated, and perhaps fantasized, revenge motives towards individuals and society are so malignant that he may constitute a grave danger to others upon his release from custody.

The hospitalization occurred between 1955 and 1958 and this remoteness seriously affects its use as a mitigating factor.

The defendant testified at the sentencing hearing and stated that he had been in mental institutions at various times until he was 19 or 20 years of age. He relies upon Messer v. State, 330 So.2d 137 (Fla. 1976) and Miller v. State, 332 So.2d 65 (Fla. 1976), where he ordered new hearings for sentencing purposes because of failure to afford defense counsel an opportunity to present psychiatric testimony to the jury. The Court, in the case sub judice did not declare the reports inadmissible. In fact, the reports had not been received and, therefore, could not be faulted for the absence of the reports at the jury phase of the sentencing hearing.

Defendant knew he had been hospitalized and testified before the jury to that effect. Stewart v. State, 339 So.2d 710 (Fla. 2d DCA 1976), involved a situation where the defendant did not inform counsel that he had been found criminally insane where using another name until after his conviction. Stewart is not applicable for

it involved newly discovered evidence while the instant case does not . . .

The reports furnished the trial judge prior to sentencing included a psychiatric examination made in 1955 when defendant was sixteen years of age. At the time "it was felt that for some reason the patient was malingering in an effort to get a low grade, but that nevertheless he was mildly mentally defective." Three years later the staff diagnosis was "sociopathic personality without mental disease." On April 15, 1958, he was discharged from the hospital and transferred to the penitentiary. There is no evidence of mental illness. From these reports, his observation of defendant and the evidence produced in the case, the trial judge found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. In other words, the trial judge found no mitigating circumstances, so the death sentence was appropriate.

Stone v. State, 378 So.2d 765, 773-774.

Stone subsequently filed two unsuccessful Fla.R.Crim.P. 3.850 motions for post-conviction relief in the trial court. Stone v. State, 481 So.2d 478, 479 (Fla. 1985). The Florida Supreme Court affirmed the denial of relief. Stone v. State, 481 So.2d 478 (Fla. 1985). The Court did conclude that Stone did not receive ineffective assistance of counsel concerning trial counsel's failure to properly investigate the psychiatric evidence of Stone's deprived and depraved childhood in mitigation. Stone v. State, 481 So.2d 478, 479-480.

The Supreme Court of Florida observed:

> Stone has failed to show sufficient prejudice. The information contained in these psychiatric reports concerned an incident which occurred when Stone was eleven years old. The diagnostic report contained

statements that Stone had homosexual tendencies, he grew up in a reformatory, and that he fantasized getting revenge on certain individuals and society in general. As we stated on direct appeal, the remoteness of this evidence seriously affects its use as a mitigating factor. 378 So.2d at 773. Further, since Stone himself testified about his mental problems at the sentencing hearing, this evidence was merely cumulative and not new. In conclusion, given the aggravating circumstances attributable to this murder, we hold that there is no reasonable probability that the admission of this psychiatric evidence would have altered the conclusion reached by the jury.

Stone v. State, 481 So.2d 478, 479.

At the evidentiary hearing held on Stone's alleged Brady v. Maryland, 373 U.S. 83 (1963) claim, Assistant Public Defender Dunham testified that he knew documentary evidence of his client's difficult upbringing lengthy institutionalization in the Missouri

juvenile system. The State could have easily rebutted any mitigating influence. This was so because evidence of the cause for said institutionalization-Stone's drowning of an 8 year old boy, was similar to his watery dispatch of Mrs. Smith. The trial judge, in denying Stone's Brady v. Maryland, supra., claim, opined that "after full review", [he had] not f[ound] this history to be a mitigating factor" in passing sentence.

Stone next, pursuant to the signing of a death warrant by then-Governor Bob Graham, filed a petition for writ of habeas corpus before Federal District Court Judge Susan Black. Of the eight issues raised, claim IV challenged the Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), issue.

The claim as set forth provided:

Claim IV

Stone was denied an individualized and accurate capital sentencing determination due to the unconstitutional application of the Florida capital sentencing statute which was reasonably interpreted at the time of Stone's trial, in July 1975, to restrict consideration of mitigating circumstances to only those circumstances narrowly set out in Fla.Stat. §921.141 with result that significant, relevant mitigating features of the case were not investigated, presented or considered in the determination of whether Stone should be sentenced to die.

Prior to this occasion, Stone's Hitchcock claim was actually the underpinning to support his ineffective assistance of counsel assertion and Brady assault. For the first time before Federal District Court Judge Black, Stone asserted the merits of his claim without strongly associating it with the two earlier assertions. Judge

Black denied all relief after conducting a non-evidentiary hearing. (Order dated September 10, 1986, Appendix A 13-100.) Judge Black concluded Stone was not denied effective assistance of counsel and further found that defense counsel's failure to present the documentary evidence concerning Stone's distant institutionalization in mitigation was a carefully reasoned tactical choice given the fact the counsel admitted realization that if he presented this evidence, it would have opened the door for the State to present evidence relating to Stone's alleged role in murdering an eight year old child in the same fashion as he did Mrs. Smith. The Court further observed:

> . . . Evidence substantiating
> . . . homosexual tendencies
> depraved family background
> and institutionalized past

> probably would not have enhanced a 1975 "Bible Belt" jury's impression of [Stone].

In the Eleventh Circuit Court of Appeals, Stone again cleverly refined his claims to two issues. The first challenged the correctness of the Strickland v. Washington, 446 U.S. 668 (1984); and the second raised independent of any counsel effectiveness status, the "Hitchcock/Lockett", issue. The Court in Stone v. Dugger, 837 F.2d. 1477 (11th Cir. 1988), rejected Stone's Strickland v. Washington/United States v. Cronic, 446 U.S. 648 (1984) claim, but concluded without consideration of the harmless error analysis of Chapman v. California, 386 U.S. 18 (1967) or Rose v. Clark, 92 L.Ed.2d 460 (1986) that a new sentencing proceeding was required in light of Hitchcock v.

Dugger, supra., and Lockett v. Ohio, 438 U.S. 586 (1978), because the district court wrongfully decided Stone was procedurally barred from raising this claim. See Stone v. Dugger, 837 F.2d at 1478, 1479.

REASONS FOR GRANTING THE WRIT

DOES HITCHCOCK V. DUGGER, 107 S. Ct. 1821, (1987), REPRESENT NEW LAW SUFFICIENT TO SATISFY A REED V. ROSS, 468 U.S. 1, (1984), CAUSE SHOWING, AND IF IT DOES, IS A FINDING OF ACTUAL PREJUDICE NO LONGER NECESSARY UNDER WAINWRIGHT V. SYKES, 433 U.S. 72, (1972)?

A panel of the Eleventh Circuit Court of Appeals in Stone v. Dugger, 837 F.2d. 1477, 1478-1479 (11th Cir. 1988), reasoned that albeit the District Court found Stone's Hitchcock claim barred because Stone could not demonstrate cause and actual prejudice for failing to raise this issue, Stone was entitled to relief because of the decision in Hitchcock v. Dugger, supra. See however: Amadeo v. Zant, 43 Crim. L. 3043 (1988), (clear error standard accorded District Court's conclusion of procedural default on constitutional challenge to grand and petit juries.)

Specifically, the court found that Stone was entitled to have his "Lockett claim heard on the merits", because of Hitchcock, therefore, cause existed. The court then went on in "assessing actual prejudice", stated:

> . . . Stone is entitled to another sentencing hearing; the record indicates that both the judge and the jury believed themselves to be limited to considering only statutory mitigating factors in respect to fixing sentence.

Stone v. Dugger, 837 F.2d at 1479.

On rehearing, Petitioners asserted that the panel's conclusion was clearly erroneous. The record reveals that Stone testified at the penalty phase on July 18, 1975, that he had been in mental institutions at various times until he was 19 or 20 years of age. Stone v. State, 378 So.2d 765, 773-774 (Fla. 1979). On August 26 and September

2, 1975, Stone's trial counsel forwarded copies of psychiatric reports to the trial court which disclosed that Stone had been admitted to the Farmington, Missouri hospital as a youth. Immediately before accepting the jury's recommendation and sentencing appellant to death on October 1, 1975, the late Judge John A. Cruise summarized defense counsel's nonstatutory mitigating submissions as relevant and germane when he ruled that evidence was both admissible and relevant:

> Mr. Hebert, You've had a opportunity to read the account that was furnished to me by Counsel for the defendant with a copy to you. It was not only the poverty that counsel refers to, but the fact that he was apparently brought up in the back of a truck. He suffered terribly at the hands of his father. It was a very bad case. The examination from the psychiatrist reflects his psychopathic tendency but there was not mental

> disorder. I think counsel has included all of that in what he was saying.

Although the judge discussed only statutory aggravating and mitigating factors in passing sentence, he did receive and "consider . . . additional information furnished by the defendant," a reference to the Missouri reports submitted by defense counsel following the jury's advisory verdict.

Barring highly suspicious circumstances not presented in this case, a federal reviewing board is required to take the word of the state judge that he acting according to the law in rendering a decision at face value. Harris v. Rivera, 454 U.S. 339, 344 (1981); Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983), cert. denied, 464 U.S. 868 (1983). Therefore, the panel's conclusion that the

sentencing judge did not consider appellant's troubled background as nonstatutory mitigating evidence, despite his assurances to the contrary is clearly erroneous and can not "equate to" actual prejudice. The court has confused what constitutes cause for failing to raise the Hitchcock claim, and the actual prejudice necessary to prevail. A similar issue exist in Adams v. Wainwright, 894 F.2d 1526 (11th Cir. 1986), modified, Adams v. Dugger, 816 F.2d. 1493 (11th Cir. 1987), cert. granted, March 7, 1988, Dugger v. Adams, Case No. 87-121 (Oral Argument set Nov. 1, 1988.) 42 Crim.L. 4181 (1988).

The failure to analyze how the facts resulted in prejudice to Stone is evident in the cursory dismissal of the District Court's determination that because this issue had not been raised

previously, Stone had procedurally defaulted the claim. Citing Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987), the court simply states that Stone is entitled to have his Lockett claim heard on the merits. Note: Circuit Judge Tjoflat dissenting opinion Ruffin v. Dugger, 848 F.2d 1512, 1519-1520 (11th Cir. 1988). ("Petitioner is not entitled to a new sentencing hearing if the Lockett error was harmless beyound a reasonable doubt. . . The court, however, fails to consider the possibility that the Lockett error may have had no prejudicial effect on petitioner's sentencing proceeding . . . .")

Hitchcock v. Dugger, supra. was never a procedural bar case. Indeed the history in Hitchcock reveals that his Lockett claim was entertained on the

merits throughout its legal trek. Circuit Judge Tjoflat's specially concurring opinion acknowledges same. 832 F.2d at 1536. The proper consideration of how a Hitchcock/Lockett claim should be entertained can be found in the original panel decision in Hargrave v. Wainwright, 804 F.2d 1182, at 1189, 1190 (11th Cir. 1986). Therein, the court determined that the Lockett/Hitchcock type assertion was not new law under Reed v. Ross, 468 U.S. 119 (1984), but rather the working tools existed as early as 1937 in Pennsylvania, ex rel , Sullivan v. Ashe, 302 U.S. 51 (1937).

Hitchcock v. Dugger, supra., identified a clear Lockett violation and because it was properly before the court on the merits, it was resolved on the merits. However, Hitchcock did not

create new law as envisioned in Reed v. Ross, supra., to support "cause for" and "actual prejudice", to overcome a procedurally barred issue. Smith v. Murray, 106 S.Ct. 2661 (1986).

Even assuming Hitchcock v. Dugger, supra., supports "cause", the new law theory of Reed v. Ross, supra., does not eliminate consideration of prejudice. The Eleventh Circuit in Hargrave, supra., as well as Adams v. Dugger, supra. ceased further analysis once cause, based on the new law theory was found. United States v. Frady, 454 U.S. 152, 170 (1982) provides for actual prejudice if an error of constitutional dimension occurring at trial works to the defendant's actual and substantial disadvantage, infecting the entire trial. (Jury instruction, no relief burden of government to prove malice as

element of crime). See also Engle v. Isaac, 456 U.S. 107 (1982). Although the ill-fated Hitchcock instructions were read to the jury in Stone's case, the record as represented herein, evidences no other restriction placed on either the jury or the sentencing court regarding the consideration of mitigating evidence presented.

The plainly erroneous assessment of Hitchcock v. Dugger, supra., "as novel or new law", vitiating the need for a finding of cause and actual prejudice has resulted in the Eleventh Circuit's complete elimination of the Sykes test. Petitioner's would urge that this court's decision in Sykes or for that matter, Hitchcock never contemplated such misuse. See Smith v. Murray, supra., (where a constitutional violation has probably resulted in a

conviction of one who is actually innocent, the writ may issue even in the absence of a cause showing).

Assuming Hitchcock v. Dugger, supra., preempts a Sykes consideration of cause and prejudice because of its constitutional impact, guidance as to the applicability of a harmless error analysis is mandated. The Eleventh Circuit Court of Appeals left without instructions beyond the dicta of Hitchcock v. Dugger, supra., regarding harmless error, will continue to misapply the limited holding of Hitchcock, supra. No effort to apply Chapman v. California, 386 U.S. 18, (1967), was contemplated by the Eleventh Circuit. See Satterwhite v. Texas, 108 S.Ct. 1792, 1977-98 (1988)

In the instant case, the Hitchcock/Lockett violation was not so

egregious as to warrant reversal of the capital sentence herein imposed. See Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985), (nonstatutory mitigation as to poor childhood, abuse would not overcome aggravating circumstances), Thompson v. Wainwright, 787 F.2d 1447, 1457-1458 (11th Cir. 1986),(no set of circumstances in mitigation would have resulted in life recommendation).

As observed in Satterwhite v. Texas, supra.:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can made an intelligent judgment about whether [an error] . . . might have effected a capital sentencing jury. Accordingly, we hold

that the Chapman harmless error rule applies. . .

The harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather then on the virtually inevitable presence of immaterial error" . . ..

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Robert A. Butterworth

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3644

RAYMOND R. STONE,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,
TOM BARTON,

Respondents-Appellees.

Appeal from the
United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion February 5, 1988, 11 Cir., 198__, ____ F.2d ____).
(September 12, 1988)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
United States
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3644

RAYMOND R. STONE,

Petitioner-Appellant,

-versus-

RICHARD L. DUGGER, TOM BARTON,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

(February 5, 1988)

Before FAY, ANDERSON and EDMONDSON, Circuit Judges

PER CURIAM:

Petitioner, Raymond R. Stone, appeals from a decision of the United States District Court for the Middle District of Florida denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. sec. 2254. Stone contends that he received ineffective assistance of counsel during the guilt and sentencing phases of his trial. Also, Stone argues that his sentencing hearing was constitutionally defective because the jury was not instructed that it could consider nonstatutory mitigating factors when rendering its advisory opinion and the sentencing judge limited his own consideration to those factors listed in Florida's capital sentencing statute

when imposing the death penalty.[1] For the following reasons, we affirm the decision of the district court denying Stone any relief as to his conviction but hold that he is entitled to resentencing.

Stone contends that the advisory jury which recommended the death penalty was instructed to consider only statutory mitigating evidence. This

---

[1] In a footnote to his brief, Stone contends that he does not wish to abandon the following claims denied by the district court in his habeas petition: Claim II - that the state withheld exculpatory material; Claim III - that his confessions were obtained in violation of the sixth amendment; Claim VI - that the sentencing jury was instructed that its obligation was merely to balance mitigating and aggravating factors; and Claim VII - that the statutory aggravating factor "especially heinous, atrocious, or cruel" is unconstitutional. Believing the district court's ruling in respect to claims II, III and VII is correct, we affirm. In respect to claim VI, we decline to rule on this claim because our decision to remand for resentencing renders this issue moot.

action, Stone argues, deprived him of the individualized sentencing determination required by the eighth amendment in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Hitchcock v. Dugger, ____ U.S. ____, 107 U.S. 1821, 95 L.Ed.2d 374 (1987); Messer v. Florida, 834 F.2d 890 (11th Cir. 1987); Hargrave v. Dugger, 832 F.2d 1524 (11th Cir. 1987) (en banc); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). The district court determined that because this issue had not been raised on his direct appeal from his conviction and sentencing, Stone had procedurally defaulted this claim; thus the claim was barred from federal habeas review because Stone could not demonstrate "cause" and "prejudice" for failing to

raise this issue. See generally Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Stone is entitled to have his Lockett claim heard on the merits. See Hargrave, 832 F.2d at 1530-31. In light of Hitchcock, ____ U.S. ____, 107 U.S. 1821, 95 L.Ed.2d 374, Stone is entitled to another sentencing hearing: the record indicates that both the judge and the jury believed themselves to be limited to considering only statutory mitigating factors in respect to fixing sentence.

Because of our disposition of this case, we need not address Stone's claim of whether he was deprived of effective assistance of counsel during his sentencing proceeding. Any claim of ineffectiveness is mooted by our granting a new sentencing hearing.

Stone makes some conclusory allegations that the guilt phase of his trial was constitutionally deficient because the assistant public defender who represented him was young, had recently graduated from law school, and had not previously tried a capital case. This situation, Stone argues, was aggravated by the fact that his attorney was overworked and that his attorney was neither assisted nor supervised by the Public Defender. The combination of these factors, according to Stone, constituted ineffective assistance of counsel, sufficient to warrant a legal presumption that he was prejudiced. Petitioner relies on United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The Supreme Court articulated a general test in regard to what

constitutes a sixth amendment ineffective assistance claim in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test consists of two components: (1) counsel's representation must have fallen below "an objective standard of reasonableness," id. at 696, 104 S.Ct. at 2068, and (2) the defendant must have demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 695, 104 S.Ct. at 2068. Furthermore, a defendant must satisfy both the performance and prejudice prongs to demonstrate successfully an ineffective assistance claim. Id. at 698, 104 S.Ct. at 2069.

Cronic, however, can offer a means of challenging a lawyer's overall

performance. "Cronic represents a narrow exception which the Supreme Court has carved out of the general rule that a petitioner claiming ineffective assistance of counsel must demonstrate that he was prejudiced by specific alleged errors in his counsel's performance. Consequently, the burden of proof under Cronic is a very heavy one." Smith v. Wainwright, 777 F.2d 609, 620 (11th Cir. 1985) (emphasis added) (citing Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984)).

Comparing Cronic to Stone's conviction is made easier by the fact that Cronic was a complex criminal case in which a defendant was represented by a young court appointed real estate attorney who had never tried a jury case. In rejecting Cronic's claim that his attorney's youth and inexperience

warranted a presumption of prejudice, the Supreme Court stated that, "[e]very experienced criminal defense attorney once tried his first criminal case." 466 U.S. at 666, 104 S.Ct. at 2050. In the instant case, Stone's contention is even less compelling than the defendant's in Cronic because Stone's attorney had previously handled other felony jury trials. Moreover, a review of the trial transcript reveals that Stone's counsel subjected the state's witnesses to meaningful cross examination and otherwise satisfies us that there was not a "fundamental breakdown of the adversarial process" sufficient to justify a presumption that Stone was prejudiced in respect to his guilt or innocence. See generally Chadwick, 740 F.2d at 900-01. Of course, even in capital felony cases

defendants have no legal right to the very best counsel.

Because we conclude that Stone's Lockett claim is meritorious, we REVERSE and REMAND to the district court with instructions to enter an order granting the application for a writ of habeas corpus unless the State of Florida provides Stone, within a reasonable period of time, a sentencing proceeding that comports with the requirements of Lockett or vacates the death sentence and imposes a lesser sentence consistent with law. See Hargrave, slip op. at 738 (citing Hitchcock, ____ U.S. at ____, 107 S.Ct. 1824-25).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RAYMOND R. STONE,

Petitioner,

v. NO. 86-792-CIV-J-14

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and R.L. DUGGER, Superintendent, Florida State Prison,

Respondents.

_____/

OPINION AND ORDER

This case is before the Court upon Raymond R. Stone's [hereinafter "petitioner's"] Petition for Writ of Habeas Corpus, filed herein on July 11, 1986. The State [hereinafter "respondent"] filed its Response to Petition for Writ of Habeas Corpus on July 13, 1986. The Court's framework for analysis of the petition begins with

the Background of this case. The Background is followed by the Procedural History of the case. The Procedural History is divided into the pretrial, trial, direct appeal, and collateral proceedings. In the final section, the Court will examine each of petitioner's grounds for habeas corpus.

BACKGROUND

Petitioner, who had been engaged in an ongoing liaison with Mrs. Jackqueline J. Smith was suspected in Mrs. Smith's death when she failed to return home from work on August 23, 1974. Petitioner has been an employee of the Smiths and lived in their residence. Petitioner disappeared the same night as Mrs. Smith. A body, alleged to be that of Mrs. Smith, was found in the Santa Fe River near the Alachua-Union County line

on September 1, 1974. The body was badly deteriorated; the head, an arm and a hand were missing.

Petitioner was taken into custody in Missouri after being involved in a traffic accident on August 31, 1974. Petitioner was returned to Florida and questioned over several days. On September 10, 1974, after failing a polygraph examination, petitioner confessed to killing Mrs. Smith, and led law enforcement officials to physical items which were later used as evidence in his trial.

On September 16 and 18, 1974, petitioner gave two other confessions for the same crime. Petitioner stated that near midnight on August 22, 1974, he met Mrs. Smith at her car in a deserted field. Petitioner stated that she got into his car voluntarily,

although the evidence indicated there was a struggle and a dragging of a body where the car was found.

Petitioner admitted that when he began driving he told his victim that she would not like where he was taking her. Upon reaching a bridge, petitioner stated that he stopped the car and reached for an axe that he kept in the back seat. While keeping the axe behind his back, he approached Mrs. Smith's side of the car and pulled her out from the car. Petitioner admitted having had trouble with the victim and acknowledged "back handing" her which caused her nose to bleed. While Mrs. Smith was struggling, petitioner took the axe and forcibly struck the victim's head with the blunt side of the axe. Petitioner then threw his victim into the alligator-infested river below the

bridge, not knowing whether she was dead or alive.

A Motion to Suppress the confessions and the physical evidence was denied, following a hearing in which the trial court found that the confessions were knowingly, voluntarily and intelligently made. Petitioner was brought to trial and the confession and physical evidence were introduced into evidence. The body in question was determined to be that of Mrs. Jackqueline J. Smith. The jury convicted petitioner of first degree murder on July 11, 1975.

Penalty phase before the jury was held July 18, 1975. The State introduced evidence of a prior conviction for robbery, a prior conviction for sodomy, and a "retake order" entered after the sodomy conviction had been vacated and then

reinstated. The State was prohibited from introducing evidence of petitioner's role in drowning an eight year old boy.

Following the presentation of aggravating and mitigating evidence, a majority of the jury recommended that petitioner be sentenced to death. Prior to the court's sentencing, petitioner himself requested the death penalty. On October 1, 1975, following the hearing and in accordance with the jury's instructions, the trial judge sentenced petitioner to death by electrocution.

PROCEDURAL HISTORY

Pretrial

On November 4, 1974, petitioner was indicted in the Eight Judicial Circuit, Union County, Florida for the murder in the first degree of Jackqueline Smith.

Exhibit I a at 1-2. On that same date, petitioner entered a plea of not guilty to that indictment. Exhibit I a at 29.

Petitioner confessed to Mrs. Smith's murder on September 10, 16, 18, 1974. Exhibit I a at 14. Petitioner filed a motion to suppress his confessions. Exhibit I a at 14-18. The trial judge held a hearing on petitioner's motion. Exhibit I b at 1-165. The trial judge denied petitioner's Motion to Suppress Confessions. Exhibit I b at 163-165.

Trial

A jury trial commenced on July 8, 1975. Exhibit I c-i. Petitioner objected to the introduction of three taped confessions into evidence on the ground that the state had not established a corpus delecti. Exhibit I f at 626-652, 753, 779. The trial judge overruled each of counsel's three

objections. Exhibit I f at 652, 753, 759.

Petitioner moved for a judgment of acquittal after the State rested its case. Exhibit I g at 820-821. The motion was denied. Exhibit I g at 835. Petitioner renewed the motion at the close of the evidence. The motion was again denied. Exhibit I h at 906, 907.

The jury returned a verdict of guilty of the crime charged in the information on July 11, 1975. Exhibit I i at 1012, 1013. The trial court adjudicated petitioner guilty of first degree murder. Exhibit I i at 1013.

On July 18, 1975, a sentencing hearing was held. Exhibit I at 1-81. A majority of the jury recommended that petitioner be sentenced to death. Exhibit I j at 78-80. Prior to the court's sentencing petitioner,

petitioner requested the death penalty. Exhibit I k at 7. On October 1, 1975, following the hearing, the trial court sentenced petitioner to death by electrocution. Exhibit I k at 1-19.

DIRECT APPEAL

Petitioner filed his Notice of Appeal on October 23, 1975. Exhibit II a. In the Brief of Appellant, Exhibit II b [hereinafter "Exhibit"], filed in the Supreme Court of Florida on April 5, 1976, petitioner raised the following six (6) issues:

SIX POINTS ON APPEAL

Point I

Whether appellant was denied due process of law and a fair trial within the meaning of the United States and Florida Constitutions because the trial court did not grant a change of venue sua sponte, refused to allow individual voir dire examination of the prospective jurors and refused to sequester the jury.

Point II

Whether appellant was denied due process of law within the meaning of the United States and Florida Constitutions because the trial court ruled that a confession obtained in contravention of the principles enunciated in Miranda v Arizona was admissible in evidence.

Point III

Whether appellant was denied due process of law and a fair trial within the meaning of the United States and Florida Constitutions because the trial court allowed into evidence pieces of bone, blood samples, and expert testimony relating to said exhibits.

Point IV

Whether appellant was denied due process of law, equal protection of the laws, and a fair trial within the meaning of the United States and Florida Constitutions when the trial court allowed certain taped confessions to be played to the jury before the State had established the corpus delecti of the crime alleged.

Point V

Whether appellant was denied due process of law, equal protection of the laws, and a fair trial within the meaning of the United States and Florida Constitutions when the trial court: (a) allowed the prosecuting attorney to urge the jury to

consider the fact that a capias had been issued on appellant as an aggravating circumstance; (b) considered the above fact as an aggravating circumstance when it imposed sentence; and (c) abused its discretion by imposing a death sentence when the aggravating circumstances in accordance with this court's interpretations of the capital sentencing scheme.

Point VI

Whether Florida's death penalty violates certain provisions of the eighth and fourteenth amendments, United States Constitution, because arbitrary, standardless discretion still exists in the form of plea bargaining, jury freedom to convict of lesser included offenses, and executive clemency, and is inherently unconstitutional in the light of evolving standards of decency that mark the progress of a maturing society.

On June 28, 1977, the Florida Supreme Court ordered the trial judge who imposed the death sentence to file a response with the Florida Supreme Court stating whether he imposed the death sentence in consideration of any information not known to petitioner.

Exhibit II d. The trial judge responded to the directions of the Florida Supreme Court on September 20, 1977, stating that the death sentence was not imposed in consideration of any information not known to petitioner. Exhibit II e. Petitioner filed a Supplemental Brief on October 31, 1977. Exhibit II f. In addition to the six issues raised in his initial brief, appellant added the following issue:

> Point Involved
>
> Whether the trial court erred in imposing the death sentence in this case and in allowing the prosecuting attorney to argue that appellant was under sentence when he committed his offense and considering same as an aggravating circumstance.

On November 1, 1979, the Florida Supreme Court affirmed the judgment and sentence. Exhibit II h; Stone v. State, 378 So.2d 765 (Fla. 1979). On November 15, 1979, petitioner filed a Motion for

Rehearing. Exhibit II j. The Florida Supreme Court denied the motion on January 31, 1980. Exhibit II n.

The United States Supreme Court denied certiorari. Stone v. Florida, 449 U.S. 986 (1980); Exhibit III. The Governor of the State of Florida denied clemency. Exhibit VI.

COLLATERAL PROCEEDINGS

On February 22, 1983, petitioner filed a Motion to Vacate Judgment and Sentence [hereinafter "3.850 motion"], pursuant to Fla.R.Crim.P. 3.850, in the state trial court in the Eighth Judicial Circuit, in and for Union County. Exhibit IV a at 1-44. In his motion, petitioner asserted the following grounds for relief:

1. Denial of right to a fair trial by an impartial jury.

2. Denial of right to effective assistance of counsel at the guilt/innocence and penalty phases of trial.

3. Arbitrariness and unreliability in determination of penalty.

4. Application of the Florida death penalty statute in violation of the Eighth and Fourteenth Amendments.

On March 2, 1983, the trial court denied petitioner's motion. Exhibit IV a at 48-50.

Petitioner appealed the denial of his 3.850 motion to the Florida Supreme Court. Exhibit V f. While the appeal was pending, petitioner's counsel claimed that they disccvered that the prosecution at trial had failed to disclose exculpatory information to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963) [hereinafter "Brady claim"] and moved that the Florida Supreme Court relinquish jurisdiction to the trial court for further findings. Exhibit V i. On December 14, 1983, the Florida

Supreme Court relinquished jurisdiction to the trial court for further findings. Exhibit V l. The trial court held an evidentiary hearing on petitioner's Brady claim, and entered an order denying relief on May 11, 1984. Exhibit V q.

On November 27, 1985, the Florida Supreme Court affirmed the order denying the Rule 3.850 motion and the trial court's action denying the Brady claim. Exhibit V t. Rehearing was denied by the Florida Supreme Court on February 6, 1986. Exhibit V w.

Petitioner's execution was scheduled for July 15, 1986. On July 11, 1986, petitioner filed with this Court his original Petition for Writ of Habeas Corpus [hereinafter "Petition"], an Application for a Stay of Execution and a Memorandum in Support of Petitioner's

Request for an Evidentiary Hearing in the event that the Court determines that Mr. Stone is not entitled to relief. The petition contained the following eight claims:

Claim I

The breakdown in the adversary system caused by neglect of duty by the elected Public Defender combined with the specific acts and omissions of Mr. Stone's inexperienced assistant public defender deprived Mr. Stone of the effective assistance of counsel at trial.

Claim II

The state withheld from the defense exculpatory material, in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Claim III

Mr. Stone's confessions were obtained in violation of Miranda v. Arizona and Edwards v. Arizona, were obtained in violation of the Sixth Amendment and were involuntary.

Claim IV

Mr. Stone was denied an individualized and accurate capital sentencing determination due to the unconstitutional application of the

Florida capital sentencing statute which was reasonably interpreted at the time of Mr. Stone's trial, in June, 1974, to restrict consideration of mitigating circumstances to only those circumstances narrowly set out in Fla.Stat. §921.141(6), with the result that significant, relevant mitigating features of the case were not investigated, presented or considered in the determination of whether Mr. Stone should be sentenced to die.

Claim V

The trial judge and prosecutor diminished the jury's sense of responsibility for sentencing, distorting the jury's important role in Florida's capital sentencing process.

Claim VI

The penalty phase instructions in this case denied Mr. Stone due process of law by failing to inform the jury that even after weighing the aggravating and mitigating circumstances it still was required to determine whether death was the appropriate penalty in the case before it.

Claim VII

On its face and as applied, the aggravating circumstances, "especially heinous, atrocious or cruel," has failed "adequately to

channel the sentencing decision patterns of juries [and judges]," Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976), in Florida, and its widespread application among cases and its singularly overwhelming mandate for death within each case has thereby resulted in "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman . . ." Id.

Claim VIII

The death penalty in Florida has been imposed in an arbitrary, discriminatory manner -- on the basis of factors which are barred from consideration in the capital sentence determination process by the Florida death penalty statute and the United States Constitution. These factors include the following:

The face of the victim, the place in which the homicide occurred (geography), and the sex of the defendant. The imposition of the death penalty on the basis of such factors violates the Eighth and Fourteenth Amendments to the United States Constitution and requires that Mr. Stone's death sentence be vacated.

On July 11, 1986, the Court, after reviewing the foregoing pleadings, ordered that the parties file memoranda

addressing whether all of the eight claims raised in the Petition for Writ of Habeas Corpus had been exhausted. Petitioner filed an Unopposed Motion for Leave to Delete Claim V of Petition on July 14, 1986. On the same date, the Court granted petitioner's Unopposed Motion for Leave to Delete Claim V and Petitioner's Application of a Stay of Execution. The Court also ordered a non-evidentiary hearing on the claims asserted in the petition and in the motion for an evidentiary hearing. On July 15, 1986, petitioner filed a motion for Change in Date of Non-Evidentiary Hearing. The Court granted petitioner's motion on July 24, 1986. On July 24, 1986, the Court heard oral argument on petitioner's motion for an evidentiary hearing and claims in the habeas petition.

CLAIM I

The breakdown in the adversary system caused by neglect of duty by the elected public defender combined with the specific acts and omissions of Mr. Stone's inexperienced assistant public defender deprived Mr. Stone of the effective assistance of counsel at trial in violation of the Sixth, Eighth and Fourteenth Amendments.

At the non-evidentiary hearing held July 24, 1986, the parties concurred that they wish the Court to focus its inquiry on whether petitioner was denied effective assistance of counsel at the sentencing phase of trial. Petitioner's crystallized assertion is that the neglect of duty by the elected public defender resulted in petitioner's counsel's failure to act effectively. Moreover, petitioner argues that the breakdown of the adversary system caused by the elected public defender's malfeasance, relieves petitioner of his

burden to demonstrate prejudice under Strickland v. Washington, 466 U.S. 668 (1984). See United States v. Cronic, 466 U.S. 648 (1984).

Respondent acknowledges that petitioner discussed this issue in his Motion to Vacate Conviction and Sentence [hereinafter "3.850 motion"], in the context of his ineffective assistance of counsel claim. However, respondent contends that because petitioner previously did not argue that a showing of prejudice was unnecessary, respondent asserts that petitioner's "shifting of gears" precludes federal adjudication of his Cronic claim. Memorandum of Law in Support of Respondent's Response at 3.

The United States Supreme Court has interpreted 28 U.S.C. §2254 as requiring that "the state prisoner provide the state courts with fair notice so that

they have the first opportunity to hear the claim . . ." Picard v. Connor, 404 U.S. 270, 275-276 (1971). Respondent correctly states that a petition for writ of habeas corpus should not be entertained unless the petitioner has first exhausted his state remedies. Rose v. Lundy, 455 U.S. 509 (1982); Gallieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc). However, this doctrine is not jurisdictional; rather, it is based on considerations of comity and the orderly administration of criminal justice. Gaddy v. Linahan, 780 F.2d 936 (11th Cir. 1986). The decision whether to grant habeas relief despite a petitioner's failure to exhaust state remedies lies within a federal court's equitable discretion. Amadeo v. Kemp, 773 F.2d 1141 (11th Cir. 1985).

The Court finds that petitioner raised the ineffective assistance of counsel claim in his 3.850 motion.[1] Moreover, the Court finds that in his 3.850 motion, petitioner specifically set forth all facts relating to the elected public defender's malfeasance. Exhibit V a at 5-26. In addition, the trial and appellate record are replete with the facts and circumstances relating to the elected public defender's acts and omissions, as well as the actions of petitioner's counsel which form the basis of petitioner's ineffective assistance of counsel claim.

The facts regarding whether the elected public defender was negligent or whether petitioner's trial counsel raised or failed to raise certain points is not at issue, but rather, as both parties agree, accepting all facts as

true, whether petitioner was denied effective assistance of counsel under the circumstances. Given the manner in which the Cronic claim arose, and in light of the fact that the facts themselves are uncontested, the Court concludes that the interests of justice would best be served by addressing petitioner's Cronic issue. See Chadwick v. Green, 740 F.2d 897, 900 n.2 (11th Cir. 1984) (where federal appellate court allowed petitioner to raise Cronic issue for the first time on appeal). Therefore, the Court will review petitioner's Cronic claim after first discussing the general ineffective assistance of counsel issue.

Strickland v. Washington, 466 U.S. 668 (1984), establishes a two-prong test to be employed by a court when reviewing the merits of whether a petitioner has

been denied his constitutional right to the effective assistance of counsel. The first prong requires the petitioner to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. The second prong of this test requires a demonstration that counsel's deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. Id. at 693-695. Petitioner must make both showings in order to prevail under the Strickland test.

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court carved out an exception to Strickland's requirement that a defendant must demonstrate prejudice; a showing of prejudice is not necessary if

there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984, citing Cronic, 466 U.S. at 653). In Cronic, the United States Supreme Court cited Powell v. Alabama, 287 U.S. 45 (1932), as an illustration of the rare case where a presumption of prejudice would apply. In Powell, defense counsel was appointed the day of trial and was denied any opportunity to prepare for trial. As a contrast to Powell, the Supreme Court cited Avery v. Alabama, 308 U.S. 444 (1940), where, although counsel in a capital case was appointed only three days before trial, the court held that adequate time for preparation had been allowed and prejudice would not be presumed.

Precedent has limited the finding of a presumption of prejudice to certain circumstances. For example, in Geders v. United States, 425 U.S. 80 (1976), the United States Supreme Court held that the actual or constructive denial of the assistance of counsel during a critical stage of the proceeding gives rise to a presumption of prejudice. The United States Supreme Court also has held that prejudice shall be presumed where counsel is burdened by an actual conflict of interest and that petitioner demonstrates that counsel actively represented a conflicting interest and that the actual conflict of interest adversely affected his lawyer's performance. See Strickland v. Washington, 466 U.S. 668 (1984); Cuyler v. Sullivan, 446 U.S. 335 (1980). The Eleventh Circuit has held that various

kinds of state interference with counsel's assistance may give rise to a presumption of prejudice. See e.g., Chadwick, 740 F.2d at 900. Recently, the United States Supreme Court has held that a single error may render counsel's representation ineffective if the error is sufficiently egregious and prejudicial. Cronic, 466 U.S. at 660; Murray v. Carrier, 54 U.S.L.W. 4820, 4825 (1986).

In Chadwick, the Eleventh Circuit opined on the general applicability of Cronic's presumption of prejudice:

> In sum, we believe that when Cronic and Washington are read in conjunction, it becomes evident that Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all. Thus simply because counsel's ineffectiveness was allegedly caused by the

> government's actions or because counsel's overall performance was substandard, a defendant has not made out a Cronic claim that would relieve him of the need to demonstrate prejudice. Rather, he must show that his counsel's performance was so impeded by the circumstances that it is unlikely that any lawyer could have provided effective assistance given the situation.

740 F.2d at 901. If petitioner fails to demonstrate that prejudice should be presumed, petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 651.

Applying petitioner's assertion of a breakdown in the adversary system to the Cronic analysis, the Court finds that the failure of the adversary system caused by the neglect of duty by the elected public official necessitates a

finding of presumption of prejudice under Cronic. Specifically, as petitioner's counsel argued at the non-evidentiary hearing and presented in his 3.850 motion, the breakdown in the adversarial system resulted in specific errors of petitioner's trial counsel. However, an analysis of the facts of the case sub judice reveals that although the situation in the Office of the Public Defender, in and for the Eighth Judicial Circuit, was far from optimum, the elected public defender's malfeasance did not rise to such a level as to impact upon petitioner's counsel's overall performance.

Petitioner has not alleged that the breakdown in the system resulted in the actual or constructive denial of the assistance of counsel during a critical stage of the proceeding, nor has

petitioner alleged that counsel was burdened by any conflict. In fact, petitioner has not claimed that there were any circumstances even similar to one in which a court has found that prejudice should be presumed. The Court finds that the basis of petitioner's claim of ineffective assistance of counsel is founded upon petitioner's assertion that trial counsel failed to properly investigate and present psychiatric evidence of petitioner's depraved childhood and homosexuality to corroborate petitioner's testimony in mitigation of sentencing.

Similarly, in Chadwick v. Green, 740 F.2d 897, 900, petitioner contended that prejudice should be presumed under Cronic. Appellate counsel asserted that the trial court's denial of a continuance to allow further trial

preparation had resulted in counsel's ineffectiveness. As in the case sub judice, the facts were uncontested. At a pretrial hearing, Chadwick's attorneys moved for a continuance, arguing that they did not have adequate time to prepare the case and that they needed additional time to obtain Chadwick's records from the state hospital and to interview the psychiatrist who had allegedly treated Chadwick. The trial court denied the motion. Chadwick's counsel failed to contact the psychiatrist or obtain Chadwick's hospital records prior to trial. At trial, the defense offered no evidence other than Chadwick's own statement that a psychiatrist had told him he was on the verge of insanity and became temporarily insane when he consumed alcohol. Even after Chadwick's

testimony, his counsel failed to make any effort to verify his statements, which would have inclined the trial court to give credence to Chadwick's story. Chadwick. 740 F.2d at 901.

After reviewing Chadwick's Cronic claim, the Eleventh Circuit concluded that the circumstances did not justify a presumption of prejudice.

> Nor can we say the trial court's ruling was clear error, as petitioner's counsel offered no evidence other than the petitioner's own statement that the petitioner's story had merit as a defense. The record also does not show that counsel attempted prior to trial to contact the psychiatrist, obtain the petitioner's records, or make any other efforts to verify the petitioner's statements which would have inclined the trial court to give credence to the petitioner's story. Moreover, as in Powell and Cronic, the historical facts of the crime were not in dispute. See Cronic, ____ U.S. ____ at ____, 104 S.Ct. at 2060-63, 2065, rather than as a fundamental breakdown of the

adversarial process such that prejudice is presumed under Cronic. Id.

Analogizing the circumstances in Chadwick v. Green, supra, to the circumstances in the present case, the Court finds that petitioner's counsel's failure to properly investigate and present corroborating evidence at sentencing is, as in Chadwick, best characterized as a failure by counsel in the performance of his investigatory duties. The Court finds that the facts in this case do not justify a presumption of prejudice. Therefore, the Court will analyze these alleged errors under Strickland, rather than Cronic.

Upon applying petitioner's assertion that trial counsel failed to properly investigate and present psychiatric evidence of petitioner's depraved

childhood and homosexuality in mitigation at sentencing under the Strickland prejudice test, the Court reaches the same conclusion as did the Florida Supreme Court. Following the guidelines promulgated in Strickland, the Florida Supreme Court held that petitioner failed to demonstrate sufficient prejudice which would entitle him to relief.

> We hold that Stone has failed to show sufficient prejudice. The information contained in these psychiatric reports concerned an incident which occurred when Stone was eleven years old. The diagnostic report contained statements that Stone was of low average intelligence, that he had homosexual tendencies, he grew up in a reformatory, and that he fantasized getting revenge on certain individuals and society in general. As we stated on direct appeal, the remoteness of this evidence seriously affects its use as a mitigating factor. 378 So.2d [765] at 773 (Fla. 1979). Further, since Stone himself testified about his mental

> problems at the sentencing hearing, this evidence was merely cumulative and now new. In conclusion, given the aggravating circumstances attributable to this murder, we hold that there is no reasonable probability that the admission of this psychiatric evidence would have altered the conclusion reached by the jury. Hence, Stone's lack of showing of sufficient prejudice defeats the ineffectiveness claim.

Exhibit V t, Stone v. State, 481 So.2d 478, 479 (Fla. 1985).

Similarly, in Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), the Eleventh Circuit found that trial counsel's failure to present allegedly mitigating evidence on that defendant's behalf was not prejudicial:

> The evidence of Thompson's background presented to the district court consisted mostly of his Marine Corps and school records. The Marine Corps records indicate that Thompson was dishonorably discharged for a misrepresentation on his enlistment papers: he stated that he had not com-

mitted homosexual acts when in actuality he had a significant history of homosexual conduct. Thompson's elementary school records include grades, teacher comments, evaluations by the school psychologist, and intelligence test scores. They indicate that he was mildly retarded, had poor motor skills, had great difficulty in basic subjects of reading, writing, and arithmetic, was hyperactive, and difficult.

Thompson also proffered the psychiatric evaluations prepared in 1976 and ignored by Solomon; these exhibits further document Thompson's troubled early years. They indicate Thompson left school in the ninth grade at the age of eighteen, that he had had difficulty getting along with his parents, and that he had been a drug abuser. All four psychiatrists who examined Thompson in 1976 concluded that he was sane at the time of the offense and that he was capable of assisting in his defense. This does not mean, however, that no psychiatric mitigating factors, statutory or nonstatutory, were indicated in the reports. Three of the psychiatrists diagnosed Thompson as having a person-

ality disorder; the fourth questioned the extent of Thompson's participation in the crime due to possible intoxication and drug use.

Finally, Thompson contends that reasonable investigation of Surace was involved with violent motorcycle gangs, had been convicted of intimidating a government witness, and at age fourteen had killed a playmate. In sum, reasonable investigation would have yielded evidence of Thompson's low intelligence and troubled past and the violent reputation of his codefendant. [Footnote omitted].

Even had the jury heard this evidence, however, we are confident that Thompson's sentence would have been the same. The jury's determination was strongly supported by the aggravating circumstances introduced in the record. Nothing Solomon could have presented would have rebutted the testimony concerning Thompson's participation in the brutal torture murder. With respect to Thompson's mental condition, which was not touched upon at the sentencing hearing, although the psychiatric reports suggested a personality disorder, and the school records indicated low intelligence,

> none of the material indicated that Thompson was suffering any specific disturbance at the time of the crime which would have mitigated his participation.

787 F.2d at 1453; accord Francois v. Wainwright, 763 F.2d 1188, 1191 (11th Cir. 1985).

Under the circumstances in this case, as respondent points out, petitioner's counsel's failure to present the documentary evidence concerning petitioner's distant institutionalized past in mitigation to the jury was a carefully reasoned tactical decision. At the evidentiary hearing on petitioner's Brady claim, petitioner's trial counsel admitted that if he had presented this evidence, it would have opened the door for the State to present evidence relating to petitioner's alleged role in murdering

an eight year old child in the same manner in which he confessed to killing Mrs. Smith. Exhibit V q at 5.

In reference to these hindsight maneuvers, the United States Supreme Court has stated:

> Our cases, however, leave no doubt that a deliberate tactical decision not to pursue a particular claim is the very antithesis of a kind of circumstance that would warrant excusing a defendant's failure to adhere to a state's legitimate rules for the fair and orderly disposition of its criminal cases. As the Court explained in Reed v. Ross: "[D]efense counsel may not make a tactical decision to forego a procedural opportunity - for instance, to object at trial or raise an issue on appeal - and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court."

Smith v. Murray, 54 U.S.L.W. 4833, 4835 (June 26, 1986), citing Reed v. Ross, 468 U.S. 1, 9 (1984). Petitioner's

counsel is now attempting to do that which the United States Supreme Court has discouraged. Moreover, as respondent asserts, evidence substantiating petitioner's testimony of homosexual tendencies, depraved family background and institutionalized past probably would not have enhanced a 1974 "Bible Belt" jury's impression of petitioner.

Although not required to do so, the Court has reviewed the facts as applied to the first prong of the Strickland claim and finds that petitioner has failed to demonstrate that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. In fact, the Court finds the contrary to be true. The state court record reveals that Dunham, petitioner's attorney, conducted

pretrial discovery (Exhibit I, Vol. A, at 3-13); filed and litigated a pretrial motion to suppress confessions and physical evidence (Exhibit I, Vol. A, at 14-18; Vol. B, at 1-163); delivered a satisfactory opening argument (Exhibit I, Vol. D, at 231-235); objected three times at trial to the confessions being introduced into evidence (Exhibit I f at 626-652, 753, 779); cross examined almost every state witness (Exhibit I, Vols. C-I); moved for a judgment of acquittal twice (Exhibit I, Vol. G at 835; Vol. H at 907); presented ten defense witnesses, predominately the victim's co-workers, in an effort to cast a reasonable doubt upon the state's theory of its case (Exhibit I, Vol. H at 836-901); delivered closing arguments to the jury at the guilt and penalty phases, respectively (Exhibit I, Vol. H

at 938-973; Vol. J at 35-56); attempted to explain petitioner's deplorable past as mitigation to the judge (Exhibit I, Vol. K at 8-11); moved for a new trial (Exhibit I, Vol. J at 70); and preserved eleven points for direct appellate review (Exhibit I, Vol. A at 24-25).

In conclusion, the Court finds that petitioner has failed to demonstrate prejudice to prevail on his claim of ineffective assistance of counsel claim. After carefully reviewing the trial transcript, the Court notes that petitioner's counsel consistently exercised reasonable professional judgment throughout all phases of his advocacy of petitioner's case. While the circumstances in the Office of the Public Defender were not optimum, the Court finds that they did not impinge on petitioner's counsel's ability to

perform. Therefore, after reviewing every conceivable aspect of petitioner's ineffective assistance of counsel claim, the Court finds that petitioner is not entitled to habeas relief on the basis of the first claim.

CLAIM II

> The state withheld from the defense exculpatory material, in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Petitioner first raised this claim in his Supplemental Brief of Appellant [hereinafter "Supplemental Brief"] which was filed on appeal from the Denial of the Motion to Vacate. See Exhibit V r. The history of petitioner's Brady claim is long and convoluted. Defense counsel claimed they discovered this issue while appeal from summary denial of a Motion to Vacate was pending in the Florida Supreme Court. The Florida Supreme Court granted a Motion to Relinquish

Jurisdiction on December 14, 1983, for further findings. Exhibit V 1.

The trial judge held an evidentiary hearing on the issue on April 24, 1984. Exhibit V q. The trial judge made the following findings of fact in denying relief:

> To Summarize: The petitioner's claim that Brady v. Maryland was violated because the Division of Corrections did not supply him with his Missouri records is in error and denied. Withholding information presumes knowledge of its existence. The evidence might indicate that the records were misplaced, but there is no evidence that the Division withheld this information. The evidence is that the inquiry by [the] defense was misdirected and the file searched did not contain the information sought. Had defense counsel searched the petitioner's prison record himself, he would have found the information he sought. This file was available to the defense.
>
> The petitioner's claim that the prosecutor withheld these records from the defense is also in error and denied. There is

no testimony as to when the State got this material. Florida State prison records do not show any member of the prosecutor's office at the prison on July 16, 1975, as a note in the petitioner's file would suggest. If this information was mailed on July 16, 1975, it is unlikely to have been in the prosecutor's hands much before July 18, 1975, the date of the Penalty Phase hearing. During the hearing, after the jury had retired but before it reached a verdict as to sentence, the prosecutor made the Court and defense counsel aware of the existence of this material. Dunham's letter of November 1974 to the prison states his understanding that his client has a psychiatric or psychological history. His testimony is that he discussed with his client his past mental and life history before placing him on the witness stand at the penalty phase. The petitioner testified to these. The defense cannot claim at this point to be unaware of such facts.

The petitioner's claim that the State withheld this information from the Court and defense at the Sentencing Hearing is in error and

denied. The defense was placed on notice by the prosecutor at the penalty phase that this material existed. In addition, the records from Missouri obtained directly by the defense, name this additional information by source and location. Defense counsel chose not to seek out this additional information from the State or the Missouri hospitals. Mr. Dunham did provide the Court several juvenile and medical reports at the Sentencing Hearing which depicted the petitioner's rather deprived and depraved background very graphically. The other or additional history obtained by the State is, in essence, of the same nature or character. The Court, after full review, did not find this history to be a mitigating factor and so stated in its sentencing order. Exhibit V q at 5-6.

The Florida Supreme Court also reviewed petitioner's claim of the alleged Brady violation. The court held:

> The rule enunciated in Brady is that "the suppression by the

prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith or prosecution." 373 U.S. at 87, 83 S.Ct. at 1196. The test of materiality is whether the suppressed evidence "might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). This is the same test which the United States Supreme Court has espoused for determining the prejudice component of an ineffectiveness claim. Strickland v. Washington, 104 S.Ct. at 1068. The evidence which Stone asserts was withheld from defense counsel by the prosecutor is the same evidence which he claims his trial counsel was ineffective for not presenting at his sentencing. We held above the outcome of the trial would not have been different had this evidence been available at trial. This, then, defeats Stone's Brady claim as well, for the test of "materiality" of the suppressed evidence has not been met. Exhibit V t at 4.

A state court's findings of fact in a post conviction proceeding are presumed correct in federal habeas proceedings if supported by substantial evidence at a full and fair hearing. Cook v. Florida Parole and Probation Commission, 749 F.2d 678, 680 n.2 (11th Cir. 1985).

The Court has reviewed the trial court's seven-page opinion denying relief on petitioner's Brady claim. In a most articulate manner, the trial court reiterated both the testimony of the seven witnesses and the contents of the eleven documents both parties presented. Exhibit V q at 2. The court found that petitioner's trial counsel testified that on one or more occasions, either he or his investigator examined the information which forms the basis of the Brady claim. Exhibit V q at 3. The

court found that the information which formed the basis of petitioner's Brady claim principally consisted of records which alleged that petitioner bound an eight year old boy with ropes and threw him to his death from a bridge. Exhibit V q at 2. In addition, the court found that petitioner's counsel testified that prior to placing his client on the stand, he interviewed him regarding his past life and history, including institutionalizations. Exhibit V q at 4. Moreover, the court found that petitioner's counsel testified that if he had presented the psychological portions of the records, that it would have opened the door for the State to display evidence relating to petitioner's alleged role in murdering an eight year old boy in the same manner in which he admitted to killing Mrs. Smith. Exhibit V q at 5.

The Court finds that petitioner was afforded a full and fair hearing, at which he was given the opportunity to present evidence to prove his claim. The record shows that petitioner's trial counsel knew about the documents which form the basis of petitioner's Brady claim and that he admittedly chose not to use them. Therefore, the Court finds that the State court's findings are supported by substantial evidence.

In addition, the Court notes that in this case, the Brady standard of materiality is the same promulgated in Strickland to determine prejudice in an ineffective assistance of counsel claim. Excluded evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. United

States v. Bagley, ____ U.S. ____, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The Court has opined that petitioner failed to demonstrate sufficient prejudice to entitle him to relief on his claim of ineffective assistance of counsel. See Claim I. Consistent with such finding, the Court agrees with the Florida Supreme Court's determination that the report which petitioner alleges should have been disclosed, is not "material" within the meaning of the Brady test. Therefore, the Court will deny habeas relief on the basis of petitioner's second claim.

CLAIM III

> Mr. Stone's confessions were obtained in violation of Miranda Arizona and Edwards v. Arizona, were obtained in violation of the Sixth Amendment and were involuntary.

Petitioner raised this claim in Issue II of his direct appeal. Exhibit

II b at 333. Petitioner's claim that his confession was not freely and voluntarily given was considered by the trial judge in a June 27, 1975, hearing on petitioner's Motion to Suppress Confession and Evidence. Exhibit I b at 1-165. Upon conclusion of the presentation of evidence, the court held that the confessions were freely, voluntarily and intelligently made.

> Now, the Court has listened, I assure you, attentively to what counsel has argued and to the testimony, and the other matters in evidence. I have had an opportunity to observe the witnesses while they were testifying as to their demeanor, their frankness or the lack of it. Their intelligence.
>
> In that connection though Mr. Stone only went to the third grade, he appears to me to be able to understand the English language and to be intelligent. I observed that when he uses the magic words of the inducement by the Sheriff of Union County, which I believe would absolutely

bar the admission of any confession. He also uses often the magic words of how he demanded counsel to be there, which I believe would bar the admission of these confessions.

On the other hand, I find by the greater weight of the evidence that these confessions were freely, voluntarily and intelligently made and after warning and I do not believe that the statement that was made after the polygraph test in Orlando was tainted in the first place . . .

Accordingly, the Motion to Suppress the confession and the several of them are hereby denied. Exhibit I b at 163-165.

In addition, this issue was considered on appeal to the Florida Supreme Court which affirmed the trial court's finding of fact that the confession was given voluntarily and not in violation of Miranda v. Arizona, 384 U.S. 436 (1966):

The ruling of the trial judge that the confessions were

> freely and voluntarily made comes to this Court with the same presumption of correctness which attends jury verdicts and final judgments. We are not at liberty to substitute our views of the credibility or weight of conflicting evidence for that of the trial judge and his ruling should not lightly be set aside. Stanford v. State, 110 So.2d 1 (Fla. 1959). We hold that the statements were freely and voluntarily made and there were no Miranda violations. Exhibit II h at 4-5.

In Wainwright v. Goode, 464 U.S. 78 (1983), the United States Supreme Court promulgated the standard by which a habeas court must evaluate the state trial judge's resolution of factual issues.

> [U]nder 28 U.S.C. §2254(d)(8), a federal court, in ruling on a petition for a writ of habeas corpus is not to overturn a factual conclusion of a state court unless the conclusion is not "fairly supported by the record." That rule applies equally to findings of trial courts and appellate courts. Sumner v. Mata, 449

U.S. 539, 545-547 (1981);
464 U.S. at 84.

Under federal standards, the test for whether a confession was voluntarily made hinges upon a determination of whether the confession was "extracted by any sort of threat or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exercise of improper influence." Hutto v. Ross, 429 U.S. 28 (1976); Brady v. United States, 397 U.S. 742 (1970).

The record reveals that petitioner did not allege any threat of violence or exercise of improper influence in regard to the taking of his confession. Exhibit I b at 1-59. In fact, the record reveals that petitioner was not being interrogated at the time he requested the attorney. Exhibit I b at 53. Additionally, the record reveals that at no time did petitioner refuse to

answer further questions following his request for an attorney. Exhibit I b at 36, 37, 53. Petitioner did not state that there was any interrogation designed to elicit incriminating statements following petitioner's request for an attorney. In fact, petitioner himself stated that he was allowed to call an attorney after requesting to do so. Exhibit I b at 53. When petitioner finally contacted counsel, the attorney he chose to telephone was a Missouri personal injury attorney whom he had said he needed to contact regarding an automobile accident.

Prosecutor Now, you made a telephone call on September 16th, didn't you?

Petitioner Yes, sir.

Prosecutor After you gave this taped statement and after the polygraph you volunteered to take the Sheriff and Joe

Uebelhere to go find the hatchet and some bloody car brackets, didn't you?

Petitioner Yes, sir.

Prosecutor And on that ride, you asked to call an attorney, didn't you?

Petitioner Yes, sir.

Prosecutor And you were allowed to call an attorney?

Petitioner After I made the statement, yes, sir.

Prosecutor Where was that that you called the attorney from?

Petitioner Some truck stop in Wildwood.

Prosecutor Was that the attorney in Missouri that you called?

Petitioner Yes, sir.

Prosecutor Did you tell that attorney anything about this criminal case?

Petitioner Yes. I told him I was charged with homicide. That's all.

Prosecutor What did he say to you?

Petitioner He didn't have too much to say. Kind of shocked a little bit.

Prosecutor Didn't give you any advice?

Petitioner No, sir.

Prosecutor Did you ask to hire him?

Petitioner No, sir. I asked him if he knew an attorney down here and he said no.

Prosecutor That's about all ya'll talked about?

Petitioner I didn't hire him.

Prosecutor You didn't ask him to represent you? You didn't get any advice from him?

Petitioner No, sir.

Prosecutor While you were there on that telephone did you call another attorney here in Florida?

Petitioner I didn't have any attorney's address.

Prosecutor Well, the attorney in Missouri, did he give you the name and number of an attorney in Florida?

Petitioner No, sir.

Exhibit I b at 53-54.

The Court has carefully reviewed the trial transcript and the transcript of

petitioner's taped confessions, which the Court notes petitioner first delivered minutes after being notified that he failed the polygraph examination. Exhibit I b at 48. The Court also has reviewed the chronology of the six times petitioner's Miranda rights were read and which were all subsequently followed by written waivers of those rights. The Court concludes that the findings of the trial judge that the confessions were freely and voluntarily given is fully supported by the record and that petitioner has not suffered a constitutional deprivation. Therefore, the Court will deny habeas relief as to petitioner's third claim.

CLAIM IV

> Mr. Stone was denied an individualized and accurate capital sentencing determination due to the unconstitutional application of the Florida capital sentencing statute which was reasonably

interpreted at the time of Mr. Stone's trial, in June 1974, to restrict consideration of mitigating circumstances to only those circumstances narrowly set out in Fla.Stat. §921.141(6) with the result that significant relevant mitigating features of the case were not investigated, presented or considered in the determination of whether Mr. Stone should be sentenced to die.

A. The ambiguity in Florida's capital sentencing law prior to Lockett v. Ohio; the statute had the potential of unconstitutional application in individual cases.

B. The potential for unconstitutional application actualized in this case.

Petitioner first raised this issue in Point Three of his 3.850 motion. Exhibit V a at 27. The Florida Supreme Court, on collateral appeal, refused to reach the merits of the claim due to petitioner's procedural default of the issue. Exhibit V t at 2.

Under Florida law, when a criminal defendant fails to raise an issue that

could have or should have been asserted on direct appeal, the issue may not be considered on a motion for post-conviction relief. McCrae v. State, 437 So.2d 1388, 1390 (Fla. 1983) (per curiam); Booker v. State, 441 So.2d 148, 150 (Fla. 1983).

The Court finds that petitioner has procedurally defaulted this claim and is barred from federal habeas review, according to Wainwright v. Sykes, 433 U.S. 72 (1977). Sykes states that a state court's finding of procedural default prevents a federal review of the same claim absent a showing of "cause for" and prejudice from the petitioner's failure to timely raise the claim. Engle v. Isaac, 456 U.S. 107 (1982). If the petitioner presented allegations of cause and prejudice going to the merits, and this Court accepted these

allegations, his procedural default might then be excused. Francis v. Henderson, 425 U.S. 536 (1976).

As cause for this issue, petitioner asserts that defense counsel misinterpreted Florida Statute §921.141, Exhibit V a at 28, and that defense counsel failed to object to the State's argument or to the jury instructions limiting consideration of mitigating circumstances. Exhibit V a at 30.

The Florida Rules of Criminal Procedure provide that failure to object to a charge before the jury retires to consider a verdict will bar an assertion of error with that charge on appeal. Fla.R.Crim.P. 3.390(d). Therefore, the Court finds that counsel's failure to object to the jury instruction at trial results in a procedural default of petitioner's claim that defense counsel

failed to object to the State's argument or to the jury instructions limiting consideration of mitigating circumstances. "(A) federal habeas petitioner who has failed to comply with a State's contemporaneous-objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim." Murray v. Carrier, 54 U.S.L.W. 4920, 4822 (June 24, 1986), citing, Wainwright v. Sykes, 433 U.S. at 87.

In addition, petitioner argues that his defense counsel misinterpreted Fla.Stat. §921.141. However, "so long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, . . . we discern no inequity

in requiring him to bear the risk of attorney error that results in a procedural default." Carrier, 54 U.S.L.W. at 4822.

The Court has reviewed petitioner's claim of ineffective assistance of counsel and has determined that petitioner was not prejudiced by counsel's alleged errors under the Strickland analysis. See Claim I. Therefore, because petitioner has failed to show cause for and prejudice from petitioner's failure to timely raise this claim, the Court finds that there is no justification to excuse petitioner's procedural default. Accordingly, the Court will deny habeas relief on petitioner's fourth claim.

CLAIM VI

The penalty phase instruction in this case denied Mr. Stone due process of law by failing to inform the jury that even after weighing

> the aggravating and mitigating circumstances it still was required to determine whether death was the appropriate penalty in the case before it.

This claim in this form was raised by petitioner in his 3.850 motion. In paragraph 5D of that motion, petitioner asserted:

> The jury was not instructed on its inherent right to grant mercy based on its assessment that, despite a finding of the existence of statutory aggravating factors, death would be an excessive and disproportionate punishment.

Exhibit V a at 28. This claim was contained in Issue III of his 3.850 motion wherein petitioner raised the "arbitrariness and unreliability in determination of penalty." The trial court denied Issue III of petitioner's 3.850 motion without a hearing on the ground that this issue had been resolved adversely to petitioner either in his direct appeal or in other recent cases.

Petitioner appealed the denial of his 3.850 motion but did not assert an error with the penalty phase instruction as a separate point for appeal. The Florida Supreme Court affirmed the denial of this issue without addressing the merits or requiring a hearing, stating: "As asserted, Issues I, III, and IV either were or could have been raised on direct appeal and, therefore, are not proper matters to be considered in a motion for post-conviction relief." Exhibit V t at 2.

As part of Point VI of his direct appeal, petitioner asserted the following:

> The iteration of eight "aggravating" and seven "mitigating" circumstances in section 921.151, F.S., does not significantly confine, channel, or regularize capital sentencing discretion.

Exhibit II b at 71. Therefore, petitioner also appears to have raised

this claim for habeas relief, although not in the exact form in which it is presented in this petition, in his direct appeal.

In response to Point VI on appeal, wherein this issue was arguably raised, the State merely pointed out that Florida's death penalty has been upheld as constitutional. Exhibit II c at 32. In resolving petitioner's Point VI on his direct appeal, the Florida Supreme Court stated: "The defendant's attack upon the constitutionality of the Florida statute providing for the death penalty is without merit." Exhibit II h at 12. Petitioner never objected specifically to the jury charge on direct appeal.

At trial, petitioner's attorney did not object to any part of the jury instruction given during the penalty

phase. In Florida, the failure to object to a charge before the jury retires to consider a verdict will bar an assertion of error with that charge on appeal. Fla.R.Crim.P. 3.390(d). Neither the State nor the Florida courts ever reached the merits of petitioner's claim of constitutional error in the jury instruction during the penalty phase. Thus, the Court finds that the failure to object to the jury instruction at trial amounts to a procedural default of this issue presented in the petition.

"[A] federal habeas petitioner who has failed to comply with a State's contemporaneous-objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim." Murray

v. Carrier, 54 U.S.L.W. 4820, 4822 (June 24, 1986), citing, Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Petitioner did not address at all the cause for the failure to timely object to the jury charge. The only reason that the Court can discern for the procedural default is petitioner's trial counsel's inadvertence. As the Supreme Court stated in Carrier: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." 54 U.S.L.W. at 6 4822.

The Court has already determined that petitioner is not entitled to

habeas relief for ineffective assistance of counsel under the Strickland v. Washington analysis. See Claim I. Moreover, the Court finds that a failure to object to the instruction at the penalty phase on the part of petitioner's counsel is not of such magnitude that it renders counsel's performance constitutionally deficient under the Strickland v. Washington, 466 U.S. 668 (1984), standard. The jury instruction at petitioner's sentencing phase occurred on July 18, 1975. Exhibit I j at 56. The case petitioner relies upon to support his assertion of error with this charge, Smith v. North Carolina, 104 S.Ct. 474, was decided in 1984. Thus, petitioner's trial counsel cannot be faulted for failing to raise an objection to the standard charge in the penalty phase.

In conclusion, the Court finds that there is no cause to excuse petitioner's procedural default of this claim for habeas relief. The Court will, therefore, deny habeas relief on petitioner's sixth claim.

CLAIM VII

> On its face and as applied, the aggravating circumstances, "especially heinous, atrocious or cruel," has failed "adequately to channel the sentencing decision patterns of juries [and judges]," Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976), in Florida and its widespread application among cases and its singularly overwhelming mandate for death within each case has thereby resulted in "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman . . ." Id.

Petitioner raised this claim in Issue Six of his direct appeal. Exhibit II b at 72. The claim that aggravating factor, "especially heinous, atrocious

or cruel," in Florida's death penalty statute is unconstitutionally vague has been "decisively repudiated." Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir. 1984), cert. denied, 106 S.Ct. 339 (1985), citing, Proffit v. Florida, 428 U.S. 242, 255-56 (1976). See also Spinkellink v. Wainwright, 578 F.2d 582, 611 (5th Cir. 1978), upholding the Florida Supreme Court's decision in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), stating that the aggravating factor "especially heinous, atrocious or cruel" contained in Section 921.141(5)(h), Florida Statutes, was not constitutionally vague. Therefore, petitioner's claim that this aggravating factor is unconstitutional on its face is without merit.

Furthermore, the trial court found in this case that petitioner's murder of Jackqueline Smith was especially heinous, atrocious and cruel. The Florida Supreme Court reviewed the facts of this case and compared the case with other similar cases. As the Florida Supreme Court noted, the death penalty for this type of murder is consistent with cases of murder which could be described as especially heinous, atrocious and cruel where no significant mitigating factor existed. See Exhibit II h at 9-10, where the Florida Supreme Court discussed Salvatore v. State, 366 So.2d 745 (Fla. 1978); Haliwell v. State, 323 So.2d 557 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975).

The Court finds, therefore, that the Florida Supreme Court carefully considered petitioner's case to

determine if the trial court properly sentenced petitioner under section 921.141 and if the death penalty in this case was consistent with penalties in other cases. While the Court need go no further, see Spinkellink, 578 F.2d at 606, the Court has also reviewed the record in this case. The murder in this case is not one in which the victim was unaware or in which the murder was non-violent. There was evidence that petitioner struck the victim in the face with his hand prior to hitting her with the hatchet and that there was a scuffle. After striking the victim, petitioner threw her off a bridge, not sure if she was alive or dead. Therefore, the evidence supports the existence of the "especially heinous, atrocious and cruel" aggravating factor in this case. Thus, this factor is not

unconstitutional as applied to the facts in this case. See Proffit v. Wainwright, 685 F.2d 1227, 1263-65 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983).

In conclusion, the Court finds that aggravating factor "especially heinous, atrocious, or cruel" is neither unconstitutional on its face nor as applied to the facts of this case. Thus, the Court will deny habeas relief on petitioner's seventh claim.

CLAIM VIII

> The death penalty in Florida has been imposed in an arbitrary, discriminatory manner -- on the basis of factors which are barred from consideration in the capital sentence determination process by the Florida death penalty statute and the United States Constitution. These factors include the following: the race of the victim, the place in which the homicide occurred (geography), and the sex of the defendant. The imposition of the death penalty on the basis of such factors violates

> the Eighth and Fourteenth Amendments to the United States Constitution and requires that Mr. Stone's death sentence be vacated.

Petitioner first raised this claim in Issue Four of his 3.850 motion. In paragraph 16B of that motion, petitioner asserted the following claim:

> The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, including but not limited to geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the occupation of the victim, and the race of the victim.

Exhibit V a at 35. The trial court rejected Issue Four without a hearing on the ground that it had been resolved adversely to petitioner either in his direct appeal or in other recent death penalty cases. See Exhibit V f at 6.

Petitioner appealed the denial of his 3.850 motion but did not assert this claim as a separate point for appeal. The Florida Supreme Court affirmed the denial of this issue without addressing the merits of requiring a hearing, stating: "As asserted, Issues I, III, and IV either were or could have been raised on direct appeal and therefore are not proper matters to be considered in a motion for post-conviction relief." Exhibit V t at 2. Petitioner did not raise this claim in his direct appeal.

The Court finds that petitioner's failure to raise this issue in his direct appeal amounts to a procedural default of this issue presented in the petition. Petitioner must, therefore, show cause for his procedural default and prejudice attributable thereto to obtain a review of this defaulted

constitutional claim. Murray v. Carrier, 54 U.S.L.W. 4820, 4822 (June 24, 1986); Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Petitioner did not address the cause for this default in his petition.

On the face of the petition, the Court can discern one possible reason for failing to properly raise this issue in the Florida courts. The statistical study on which petitioner relies in his petition, Gross & Mauro, Patterns of Death, 37 Stan. L. Rev. 27, see Petition, at 122, was not published until 1984. However, the unconstitutional effect of race, one of the factors asserted by petitioner, on the imposition of the death penalty was realized at least as long ago as 1972 when the Supreme Court decided Furman v. Georgia, 408 U.S. 238. Therefore, this

Court agrees with the Florida Supreme Court which found that this issue could have been raised on direct appeal.

In addition, petitioner cannot assert his counsel's ineffectiveness as cause for failing to properly raise this issue. In Spinkellink v. Wainwright, 578 F.2d 582, 613 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979), the court addressed a statistical study which indicated that Florida's death penalty was being applied disproportionately where the victim was white. The court, assuming the statistics to be accurate, squarely rejected that this application of the death penalty violated the Eighth and Fourteenth Amendment, id. at 614, and the Equal Protection Clause of the Fourteenth Amendment, id. at 615. Thereafter, in Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert.

denied, 464 U.S. 1063 (1984), the court also dealt with a statistical study supporting the claim that the Florida death penalty was imposed disproportionately in cases involving white victims. The court again rejected the claim stating that the statistical evidence was not so strong as to lead to an inference of intentional discrimination.

Most recently, the Eleventh Circuit, in commenting on these cases, stated: "The lesson from these and other cases must be that generalized statistical studies are of little use in deciding whether a particular defendant has been unconstitutionally sentenced to death." McClesky v. Kemp, 753 F.2d 877, 893 (11th Cir. 1985) (en banc). In McClesky, the Eleventh Circuit specifically addressed the Baldus study

of the death penalty in Georgia. The court, however, referred to the Gross & Mauro study of Florida's death penalty relied upon by petitioner. The Eleventh Circuit discussed the three Supreme Court cases addressing the Gross & Mauro study, Wainwright v. Ford, ____ U.S. ____, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984) (denying state's application to vacate a stay on other grounds); Wainwright v. Adams, ____ U.S. ____, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1983). See McClesky, 753 F.2d at 897. The Eleventh Circuit concluded that the "Supreme Court in Sullivan, Adams and Ford found the bottom line in the Gross and Mauro study insufficient to raise a constitutional claim . . ." Id. While certiorari was granted in part by the Supreme Court, McClesky v. Kemp, No. 84-6811 (U.S. July 7, 1986), the Eleventh

Circuit's holding that the Supreme Court rejected the Gross & Mauro study in Sullivan, Adams, and Ford, is the law this Court must follow. In addition, aside from the circumstantial evidence presented in the statistical study, petitioner presents no direct evidence of discrimination based on the victim's race in this case. Thus, because the Gross & Mauro study fails to compel an inference of purposeful discrimination and there is no direct evidence of discrimination, petitioner would not be entitled to an evidentiary hearing. See Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc) (rejecting Bauer and Pierce study also cited by petitioner). Thus, petitioner's attorney, even if he had raised this point on direct appeal, would not have been successful.

In conclusion, the Court finds that petitioner has procedurally defaulted his claim that the death penalty is imposed after consideration of factors barred from consideration by the Florida Statutes and the United States Constitution, including race of the victim, geography and sex of the defendant. Furthermore, there is no cause to excuse this default. Accordingly, the Court finds that petitioner's eighth claim for habeas relief is without merit.

In conclusion, the Court has determined that petitioner is not entitled to relief on any of the claims asserted in the Petition. In making this determination, the Court has accepted the facts supporting the claims as true and, therefore, the Court finds that an evidentiary hearing is not

necessary. The Court will, therefore, vacate its previous order granting a stay of execution and will direct the Clerk of the Court to enter judgment dismissing this case.

Accordingly, it is

ORDERED:

1. That Petitioner's Request for Evidentiary Hearing, filed herein on July 11, 1986, is denied.

2. That the Petition for Writ of Habeas Corpus, filed herein on July 11, 1986, is denied.

3. That the Court's Order Staying Execution, entered herein on July 14, 1986, is hereby vacated.

4. That the Clerk of the Court is hereby directed to enter final judgment dismissing this case.

DONE AND ORDERED at Jacksonville, Florida this 10th day of September, 1986.

/S/ Susan Black
UNITED STATES
DISTRICT JUDGE

Copies to:

Counsel of Record

NOTES

[1]Although the issue raised in his 3.850 motion was entitled "Denial of Right to Effective Assistance of Counsel at the Guilt/Innocence and Penalty Phases of Trial," the Court finds that all facts and circumstances supporting petitioner's present claim were cited in his 3.850 motion. See 3.850 motion at 5-26. For example, paragraph 14B(1) of the 3.850 motion states:

> The elected public defender, Mack Futch, was unavailable due to alcoholism. The details of his problems are contained with the records of the Governor and the Florida Department of Law Enforcement
> . . .

Exhibit V a at 9. In addition, petitioner argues:

> Dunham was an inexperienced lawyer. He had graduated from law school in December, 1973, beginning work immediately with the public defender's office. He was admitted to the Bar in May, 1974. In November, 1974, just six months after being admitted, Dunham was assigned the first degree murder case of Raymond Stone. At the time Dunham was assigned the Stone case, he had participated in two or three felony jury trials. This

was his first murder case.

Exhibit V at 10.

[2]Petitioner's argument is undermined at the outset in light of petitioner's counsel's claim. Throughout the record, counsel requested the Court to focus only on the alleged ineffectiveness of counsel at the sentencing phase of trial when the situation in the Office of the Public Defender was the same throughout petitioner's trial and sentencing. Moreover, the same attorney represented petitioner throughout both his trial and his sentencing hearing.

[3]During trial, petitioner's counsel three times objected to the confession tapes' introduction into evidence on the ground the State had not established a corpus delecti. Exhibit I f at 626-652, 753, 779. The trial judge overruled each of counsel's three objections. Exhibit I f at 652, 753, 759.

Raymond STONE, Petitioner,

v.

STATE of Florida, Respondent.

No. 63638

Supreme Court of Florida

Nov. 27, 1985.

Rehearing Denied, Feb. 6, 1986

Defendant appealed from order of the Circuit Court, Union County, R.A. Green, Jr., J., denying his motion for postconviction relief. The Supreme Court, Adkins, J., held that defendant was not denied effective assistance of counsel due to his trial counsel's failure to investigate and present psychiatric evidence of defendant's deprived and depraved childhood in mitigation at sentencing.

Affirmed.

ADKINS, Justice.

Raymond Stone appeals the denial without a hearing of his motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. While this appeal was pending, defense counsel discovered the existence of a claim allegedly in violation of **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This Court granted a motion to relinquish jurisdiction to the trial court for further findings in conjunction with the facts alleged in the motion. After an evidentiary hearing was held on the **Brady** claim, the trial court entered its order denying relief. This appeal followed. The parties, after receiving permission from this Court, have filed Supplemental Briefs on the **Brady** issue. Regarding the initial motion for post-conviction relief, since we find that

the motion and the files in the case conclusively show that appellant is not entitled to relief, we affirm the order of the trial court denying the motion without an evidentiary hearing. **Foster v. State**, 400 So.2d 1 (Fla. 1981). We also affirm the trial court's action denying appellant's second motion for post-conviction relief, after an evidentiary hearing, on the **Brady** claim.

Appellant was convicted of the first-degree murder of Jacqueline Smith and sentenced to death. This Court on direct appeal affirmed the conviction and sentence. **Stone v. State**, 378 So.2d 765 (Fla. 1979).

In his motion for post-conviction relief appellant asserted the following four grounds:

I. Denial of a fair trial by an impartial jury.

II. Denial of effective assistance of trial counsel.

III. Deficiencies in jury instructions and findings of aggravated factors at sentencing.

IV. Unconstitutionality of the Florida death penalty as applied.

[1] As asserted, Issues I, III and IV either were or could have been raised on direct appeal and therefore are not proper matters to be considered in a motion for post-conviction relief. **Meeks v. State**, 382 So.2d 673 (Fla. 1980); **Witt v. State**, 387 So.2d 922 (Fla. 1980), **cert. denied**, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

Thus, only appellant's claim that he was denied the effective assistance of trial counsel remains to be resolved by this Court.

[2] We will therefore proceed to evaluate the claim of legal incompetency according to the guidelines enunciated by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **See also Knight v. State**, 394 So.2d 997 (Fla. 1981).

Appellant argues that his trial counsel failed to properly investigate and present psychiatric evidence of appellant's deprived and depraved childhood in mitigation at sentencing. The trial court did not evaluate this claim, because it determined that the issue had been resolved by this Court on direct appeal. On direct appeal Stone argued that he should receive a new sentencing hearing because these same psychiatric reports were not presented to the jury, relying upon **Messer v.**

State, 330 So.2d 137 (Fla. 1976), and Miller v. State, 332 So.2d 65 (Fla. 1976). In rejecting this claim we stated that "[n]either the judge nor defense counsel could be faulted for the absence of the reports at the jury phase of the sentencing hearing." 378 So.2d at 773. The point of this statement was to distinguish Messer and Miller, where the court had ruled similar evidence inadmissible when offered by defense counsel. It was not a determination of the competency of trial counsel.

However, upon evaluation of the files and record in this case, we conclude that the trial judge was correct in denying petitioner's claim of ineffective assistance of trial counsel, even if perhaps for the wrong reason. The standard in any case presenting an ineffectiveness claim is whether

"counsel's assistance was reasonable considering all the circumstances." 104 S.Ct. at 2065. And, even if there is a professionally unreasonable error by counsel, it does not warrant setting aside the judgment if the error had no effect on the judgment. Id. at 2067. In order to prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2068. We hold that Stone has failed to show sufficient prejudice. The information contained in these psychiatric reports concerned an incident which occurred when Stone was eleven years old. The diagnostic report contained statements that Stone was of low average intelligence, that he had homosexual tendencies, he grew up in a

reformatory, and that he fantasized getting revenge on certain individuals and society in general. As we stated on direct appeal, the remoteness of this evidence seriously affects its use as a mitigating factor. 378 So.2d at 773. Further, since Stone himself testified about his mental problems at the sentencing hearing, this evidence was merely cumulative and not new. In conclusion, given the aggravating circumstances attributable to this murder, we hold that there is no reasonable probability that the admission of this psychiatric evidence would have altered the conclusion reached by the jury. Hence, Stone's lack of showing of sufficient prejudice defeats the ineffectiveness claim.

[3] Turning now to Stone's claim that the prosecution failed to disclose

exculpatory information to the defense in violation of **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 1215 (1963), we conclude that the trial judge did not err in denying what was essentially an additional 3.850 motion. Although the state argues a myriad of reasons why the motion should be denied, some of them procedural, some substantive, our disposition of this issue renders it unnecessary to discuss all but one. The rule enunciated in **Brady** is that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196. The test for materiality is whether the suppressed

evidence "might have affected the outcome of the trial." **United States v. Agurs**, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). This is the same test the United States Supreme Court has espoused for determining the prejudice component of an ineffectiveness claim. **Strickland v. Washington**, 104 S.Ct. at 2068. The evidence which Stone asserts was withheld from defense counsel by the prosecutor is the same evidence which he claims his trial counsel was ineffective for not presenting at his sentencing. We held above the outcome of the trial would not have been different had this evidence been available at trial. This, then, defeats Stone's **Brady** claim as well, for the test of "materiality" of the suppressed evidence has not been met.

Accordingly, we hold that the trial court was correct in denying relief on Stone's post-conviction motions.

Is is so ordered.

BOYD, C.J., and OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

Raymond R. STONE, Appellant,

v.

STATE of Florida, Appellee.

No. 48275

Supreme Court of Florida

Nov. 1, 1979

Rehearing Denied Jan. 31, 1980

Defendant was convicted of murder in the first degree, and from the judgment of the Circuit Court, in and for Union County, John J. Crews, J., the defendant appealed. The Supreme Court, Adkins, J., held that: (1) the record including ease in selecting jury was evidence that change of venue was not required; (2) denial of motion that each prospective juror be examined individually with others absent was not an abuse of discretion; (3) a request for counsel for unrelated purpose is not sufficient to require interrogation to cease under

Miranda; (4) defendant's confession was freely and voluntarily made and there were no Miranda violations; (5) evidence of pieces of bone, blood samples, and expert testimony relating to exhibits was properly admitted; (6) the taped confessions played to jury did not deny due process of a fair trial on theory that they were played before State had established corpus delicti; and (7) under the record, sentence of death was proper.

Affirmed.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

On August 22, 1974, the victim, Jacqueline Smith, reported for work at a General Electric plant. Her hours were

from 3:30 p.m. until midnight. She did not return from work and, after searching for her, Marvin Smith, her husband, notified police authorities. Later in the morning her automobile was found parked in a field near her home.

The defendant had been employed by the victim's husband in May 1974 to assist in the farming of his tobacco crop. At the time of the homicide defendant was staying with the Smiths in their home.

On September 1, 1974, a body was found in the Santa Fe River approximately one-fourth mile west of a bridge. The neck region and the head were missing, as well as the left upper extremity. The hand and right upper extremity were also missing. Dr. L.F. Beamer, a pathologist, identified the torso as being that of the victim by

virtue of a laminestomy scar and an abnormality of the twelfth rib.

The defendant was involved in an accident in Missouri when a truck collided with the rear of his vehicle. Defendant was hospitalized and, while in the hospital, Missouri police officials arrested him on August 31, 1974. Florida had lodged a detainer against him because the state won an appeal relating to an earlier criminal conviction for sodomy and Florida officials wished to return him for the purpose of serving the remainder of his sentence.

A Florida officer met defendant in Missouri on September 4, 1974, and returned him to Florida. He was taken to Leon County Jail, then to the Lake Butler Reception and Medical Center for further medical treatment. This medical

center is a part of the prison system of Florida.

Defendant was informed that he was a suspect in a murder case. Eventually defendant confessed, an indictment was returned and, upon trial, defendant was found guilty of murder in the first degree. The sentence hearing resulted in a recommendation of death and the trial judge imposed the death sentence. This appeal resulted.

Defendant says that the court should have granted a change of venue on its own motion. Union County, the place of the homicide, was a small county in which two of the state's major penal institutions are located. Defendant contends that the jury venire was prejudiced because the prison system is the major source of revenue, directly or indirectly, for the residents of the county.

[1] During the trial, defendant did not file a motion for change of venue. This precludes appellate review, as the appellate court must confine itself to review of only those questions which were before the trial court and upon which a ruling adverse to the defendant was made. State v. Barber, 301 So.2d 7 (Fla. 1974).

[2] Also, there is no provision by rule or statute for the court to change venue on its own motion. The defendant has the constitutional right to a trial where the offense occurred and a change of venue granted without an appropriate motion or the consent of the defendant is of doubtful validity. North v. State, 65 So.2d 77 (Fla. 1952); aff'd North v. Florida, 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed.2d 423 (1954). See also Ward v. State, 328 So.2d 260 (Fla. 1st DCA 1976).

[3] The record discloses that of thirty-seven prospective jurors only two were excused because they had formed an opinion. Twenty-three prospective jurors indicated that they had heard something about the case. There had been news coverage, but there is no indication that any of the coverage was prejudicial. The ease in selecting the jury is further evidence that a change of venue was not required. **See Gavin v. State**, 259 So.2d 544 (Fla. 3rd DCA 1972).

[4] During the voir dire examination, defense counsel requested that each prospective juror be examined individually with the others absent, "so that those who had specific knowledge of the crime would not contaminate the others' minds." The trial court did not commit reversible error in denying this

motion. Such a request is addressed to the discretion of the court and the record fails to show an abuse of discretion. **Branch v. State**, 212 So.2d 29 (Fla. 2nd DCA 1968).

Defendant next contends that his confession was obtained in violation of **Miranda v. Arizona**, 384 U.S.436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At a hearing on the motion to suppress, it appeared from the testimony that defendant was first taken into custody in Missouri under the authority of a detainer lodged pursuant to section 941.45, Florida Statutes (1973). Defendant's conviction in another case had been affirmed on direct appeal. **Stone v. State**, 245 So.2d 91 (Fla. 1st DCA 1971), **cert. denied**, 267 So.2d 329 (Fla. 1972).

Defendant then sought and received relief in the federal district court and the United States Court of Appeals, Fifth District, **Stone v. Wainwright**, 478 F.2d 390 (5th Cir. 1973). The United States Supreme Court reversed the Fifth Circuit Court of Appeals, **Wainwright v. Stone**, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973). It was subsequent to this holding that defendant's custody was sought by the prison officials of Florida.

The automobile accident in Missouri triggered a routine identification check and a Florida official was sent to Missouri to take custody of the defendant.

[5] Defendant, while in Missouri, was advised that he was a suspect in a murder case. When defendant was first taken to the Leon County Jail (where he

was held for five or six days until his admission to the Lake Butler Reception and Medical Center), he contends that he should have been taken before a booking officer as required by rule 3.11(c), Florida Rules of Criminal Procedure. Defendant was brought to Florida under a detainer related to an entirely different offense. Although he was a suspect, he had not been charged with the commission of any homicide nor had he been arrested for any new offense. Therefore, it was not necessary to take him before a "booking officer" or a magistrate.

Defendant was given **Miranda** warnings on no less than six different occasions. At 11:05 a.m., September 10th, he was first given the warnings. At this time, he waived his rights and did not ask for an attorney. He was again given the

warnings at 1:40 p.m. on the same day, and once again defendant waived his rights and did not ask for an attorney.

On September 16th, the defendant voluntarily took a lie detector test, at which time his rights were explained to him again. He was also warned of his rights on the afternoon of September 16th. On September 18th, defendant was given **Miranda** warnings at 1:45 p.m. and 7:30 p.m. All of these warnings were read and reviewed with him, and he appeared to understand them.

There is evidence that defendant wanted to get in contact with an attorney during this period of time. The attorney had offices in Missouri and represented the truck driver involved in the accident in Missouri which resulted in the hospitalization of defendant. Defendant had received the attorney's

card while he was in the Missouri hospital and indicated that he wished to contact the attorney so he could sue for a neck injury which he received in the accident. The record does not disclose that defendant requested counsel in connection with the homicide under investigation. At first, the defendant apparently was not worried about the murder charge. When defendant called an attorney after the confession, the call was made to this Missouri attorney.

Defendant alleged that he was told a court order required him to take a lie detector test. It was necessary to secure a court order in order to have the defendant released from jail, but defendant was told that he had a choice as to whether to take the test or not. The form delineating his rights, which was explained to him before he took the

test, advised him that he did not have to take it. Defendant even admitted that he consented to take the lie detector test.

[6] A request for counsel for an unrelated purpose is not sufficient to require interrogation to cease under **Miranda v. Arizona**. This was the holding in **Hill v. State**, 429 S.W.2d 481 (Tex.Cr.App. 1968), where the accused indicated that he was going to get counsel for an unspecified purpose.

The law enforcement officers testified that defendant did not request consultation with an attorney before questioning on either September 16 or September 18, the days he admitted his guilt. Even had he requested consultation with an attorney, that would not prohibit a subsequent waiver. In **Nunez v. State**, 227 So.2d 324 (Fla. 4th DCA 1969), the court stated:

> Simply stated, the question is whether an accused in custody, having once made known his desire to have the assistance of counsel, may subsequently voluntarily waive such right.
>
> We think this question must be answered in the affirmative, because an accused in custody is just as much entitled to waive the constitutional rights outlined in the **Miranda** case as he is to insist upon them.

Just before the polygraph test, the defendant was given adequate **Miranda** warnings. The examination began at 10:30 a.m. and lasted about one and one-half hours. Within minutes after learning he flunked the test, defendant confessed.

[7,8] The ruling of the trial judge that the confession was freely and voluntarily made comes to this Court with the same presumption of correctness which attends jury verdicts and final judgments. We are not at liberty to

substitute our views of the credibility or weight of conflicting evidence for that of the trial judge and his ruling should not lightly be set aside. **Stanford v. State**, 110 So.2d 1 (Fla. 1959). We hold that the statements were freely and voluntarily made and there were no **Miranda** violations.

[9] Defendant says he was denied due process of law and a fair trial because the trial court allowed into evidence pieces of bone, blood samples, and expert testimony relating to the exhibits. He contends that the evidence was not sufficiently tied to the offense and was produced solely for the purpose of prejudicing the jury.

The lengthy taped statement of the defendant contained the following:

> She walked around and got in on the passenger side and she did go around behind my car like that to get in. And she wasn't excited or nervous or

none of that. And neither was I at the time but I was drinking that beer and smokin that marijuana and, uh, she said, you know, where we going. I said yeah, but you ain't going to like it. And she said, 'Well, I'm sure that you made up your mind that you are going to meet me,' she said, 'Everyone else meets me when I ask 'em to.' Now she did not mention no names or none of that and I said, well, just like I told you, I said, but you ain't going to like it. So I drove down, I turned left down on Highway 18 and went down to this other road and turned right. There's a big long bridge there and its a new black top paved road.

. . . . .

. . . So I went down that road there and I stopped in the middle of the bridge. I shut my lights off and I got out. The light did not come on in my car, you know, because I had a blowed fuse and I had wrapped it with tinfoil but my radio wouldn't even play. So, I got out and I walk around the car like this and I had a hatchet behind me like this. I opened the door for her, see, okay, she started to get out and I hit her in the head with the hatchet Not the sharp point now, but the back of the hatchet.

. . . . .

She fell down. And I had, had trouble gettin' over the bridge. And the way I dumped her over the

> bridge, I had to get her feet up there first, you know, and keep inch up like that till I got her over the bridge.
>
> . . . . .
>
> . . . she had on a pair of shorts and I don't know if it was a blouse or a sweater. Now, that's all I can say but as far an anything else she did not have nothing, there was nothin' in my car that belonged to her.

The state attempted to demonstrate that defendant's statements as to how he struck the victim and what he did with the body were consistent with the evidence. The headless torso, identified as the victim, was found one-fourth or a mile west of the bridge described in defendant's statement. The skull was found 150-200 yards west of the bridge. Not only was the skull consistent with a white female of the victim's age, but it showed trauma exactly where defendant admitted striking the victim.

On the day the body was found (nine days after the homicide), a spot was found within the section of railing where defendant said he threw the body into the river. This spot was removed and a serologist was unable to determine the blood group factor. Also admitted into evidence was a blood sample secured from articles that had been in the defendant's automobile. The defendant led the way to the discovery of this blood sample. These pieces of bone, blood samples, and expert testimony relating to such exhibits were properly admitted into evidence.

[10] It is a fundamental principle of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of

evidence. **State v. Wadsworth**, 210 So.2d 4 (Fla. 1968); **Williams v. State**, 110 So.2d 654 (Fla. 1959).

The condition of the skull corroborated the statement of the defendant, in that there was evidence if a trauma. In the opinion of an expert "an appreciably large amount" caused the trauma "at or near the time of death." The skull was admissible as being relevant in proving the manner in which the homicide was committed. See **Larmon v. State**, 81 Fla. 553, 88 So. 471 (1921), where the skull of the deceased was held admissible to show the course of the bullet.

The evidence of the blood stains and the testimony of experts met the test of relevancy and such evidence was properly admitted. Defendant's objections went primarily to the weight

to be given to such evidence. That was for the jury, and the jury was fully apprised on the limitations of the probative value of such evidence.

Defendant next contends that the taped confessions were played to the jury before the state had established the corpus delicti of the crime and he was thereby denied due process of the law and a fair trail.

[11] The corpus delicti in homicide cases consists of three elements: the fact of death, the criminal agency of another person as the cause thereof, and the identify of the deceased. Lee v. State, 96 Fla. 59, 117 So.669 (1928).

[12,13] The guidelines indetermining whether the corpus delicti was adequately proved prior to the admission of the confession in the

evidence are set forth in **Frazier v. State**, 107 So.2d 16, 26 (Fla. 1958), as follows:

> It is true that before a confession should be received in evidence there must be some independent proof of the corpus delicti. **Parrish v. State**, 1925, 90 Fla. 25, 105 So. 130; **Keir v. State**, 1943, 152 Fla. 389, 11 So.2d 886. There should at least be some additional substantial evidence, either direct or circumstantial. **Tucker v. State**, 1912, 64 Fla. 518, 59 So. 941. The corpus delicti need not be proved beyond a reasonable doubt, but it is enough if the evidence tends to show that the crime was committed. **McElveen v. State**, Fla. 1954, 72 So.2d 785; **Graham v. State**, 1943, 153 Fla. 807, 16 So.2d 59. The only question is whether the evidence of the corpus delicti is prima facie sufficient to authorize the admission of the confession. **Nickels v. State**, 1925, 90 Fla. 659, 106 So. 479, supra; **Graham v. State**, supra. See Annotation: 45 A.L.R.2d 1316 (1954).

[14] The fact of the death was conceded and the identity of the deceased was demonstrated by the most available evidence, considering the decomposition of the body. See **Trowell**

v. State, 288 So.2d 506 (Fla. 1st DCA 1973). The body was the right size, color and sex. Examination of the body disclosed a laminectomy scar similar to an operation the victim had undergone. Also, a congenital abnormality of the 12th rib of the corpse corresponded to an abnormality appearing in an X-ray of the victim. The doctor identified the body of the deceased to a reasonable medical certainty. Also, there was proof that the shorts on the body were those of the victim.

The proof was more then adequate to show the criminal agency of another. The element need not be established beyond a reasonable doubt for the purpose of admitting a confession.

The victim "punched out" from work at midnight and, under ordinary circumstances, would have arrived home

one-half hour later. She always returned home immediately after work and the record clearly shows that she was a good, hard-working woman. There is no evidence indicating or implying the she would enter the waters of the river in the middle of the night, naked from the waist up, and with her shorts and underpants partially removed. There were scuffle makes around her car. A broken key chain was found on the floorboard. The evidence of foul play was sufficient to show that her death was caused by the criminal agency of another. A sufficient predicate was laid for the introduction of the taped confession into evidence.

[15] During the sentencing procedure, the prosecuting attorney argued that defendant was a person "under sentence of imprisonment." The trial judge

found as an aggravating circumstance that the crime was committed "while the defendant was under sentence of imprisonment." §921.141(5)(a), Fla.Stat. (1973).

Defendant was first taken into custody in Missouri after the United States Supreme Court ruled that he had been improperly discharged by a federal district court from a sodomy conviction. Defendant was detained by the Missouri authorities at the request of the state of Florida, and he was returned to Florida for the purpose of serving this sentence. Defendant says that he was not under sentence of imprisonment at the time of the homicide because he had been released by a federal court order. The state contends that the legislature intended to cover persons under sentence of

imprisonment, whether released by reason of bail, probation, parole, mandatory conditional release or otherwise.

The sole purpose of the federal proceedings in habeas corpus was to determine the legality of the restraint on liberty. **Fast v. Wainwright**, 310 F.Supp. 404 at 405 (So. Dist.Fla.1970), **aff'd** 439 F.2d 1162 (5th Cir. 1971). As long as the proceedings in federal court were pending, defendant was under sentence of imprisonment, and would remain so until the federal proceedings were concluded favorably to defendant. The final determination was that defendant be returned to custody.

[16] The trial judge also found the following aggravating circumstances:

> . . . B. At the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of more than

> one felony involving the use or threat of violence to some person. C. The murder of Jacqueline Smith by the Defendant, Raymond R. Stone, was especially heinous, atrocious and cruel. D. The Court does not consider the remaining aggravating circumstances enumerated in Section 921.141(5), Florida Statutes, applicable to the Defendant. . . .
>
> Inasmuch as the trial court found these other aggravating circumstances, and no mitigating circumstances, death is presumed to be the proper sentence. **State v. Dixon**, 283 So.2d 1 (Fla. 1973).

[17] Defendant's claim that his use of beer and marijuana should have been considered in mitigation is negated by the testimony of witnesses who saw him at various times shortly after the homicide. On each occasion, she seemed normal, not intoxicated. His behavior in cleaning up the blood after the homicide, preparing to flee and leaving the area, demonstrate his awareness that his action was wrong. He even discussed the fact that he was in

trouble and the advisability of running away shortly after the killing.

Defendant said that the victim parked her own car and joined him voluntarily, apparently for a dalliance. He prepared for the meeting by hiding a hatchet behind his back. He backhanded the victim at one point, making her nose bleed, then struck her several times over the head with the blunt side of the hatchet. To assure that she would have no change of recovery, he threw her body into the river from a bridge.

[18] Defendant relies upon **Swan** v. **State**, 322 So.2d 485 (Fla. 1985) to reduce the sentence to life imprisonment. In **Swan**, the defendant administered a severe beating to the victim before she died this Court reversed a sentence of death. **Swan**

involved a 19-year old boy engaged in a burglary or robbery. The defendant Stone was 36. There was no indication that Swan used a deadly weapon Stone used one. Swan's victim lived for a week while Stone inflicted a beating sufficient to kill. The previous record of Stone was more serious than that of Swan. Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight. **Tedder v. State**, 322 So.2d 908 (Fla. 1975).

Also distinguishable is **Halliwell v. State**, 323 So.2d 557 (Fla. 1975) where this Court reversed the death sentence imposed upon a defendant who had been convicted of murdering his paramour's husband. He beat the victim to death with an iron bar and dismembered the body after death. The victim in

Halliwell had bragged about beating his wife and this triggered Halliwell's passion and provoked the fatal beating. Stone had no such excuse. Halliwell had no criminal record and was a highly decorated Green Beret. Stone spent most of his life in institutions.

In Salvatore v. State, 366 So.2d 745 (Fla. 1978), the defendant, with no significant criminal history, bludgeoned the victim to death then disposed of the body by dumping it at sea. The death sentence was held to be appropriate. Defendant Stone bludgeoned the victim to death and disposed of the body by dumping it in the river river. He had a significant criminal history. Compared with Salvatore, the death sentence here was appropriate.

[19] Even though defendant confessed and even though he expressed a desire to be executed, the Court has, nevertheless, examined the record to be sure that the imposition of the death sentence complies with all of the standards set by the constitution, the legislature, and the Court. **See Goode v. State**, 365 So.2d 381 (Fla. 1978).

[20] The sentence recommendation of the jury was rendered July 18, 1975. Sentence was imposed on October 1, 1975. On August 26th and September 2nd, 1975, defendant's trial counsel forwarded copies of psychiatric reports to the trial court which disclosed that defendant was admitted to Farmington State Hospital on June 8, 1955, under the alias "Walter Herron." The case history of defendant included an incident which occurred when he was

eleven years of age. At that time he and two other boys bound another child and threw the child into a rive where he drowned. The diagnostic report revealed the following:

> Sociopathic youth from a deprived and depraved environment whose basic trust in others is so low that the possibility of an uneventful adjustment is considered very doubtful. He is considered to be of low average intelligence and in good contact with reality; however, his stated and perhaps fantasized revenge motives towards individuals and society are so malignant that he may constitute a grave danger to other upon his release from custody.

The hospitalization occurred between 1955 and 1958 and this remoteness seriously affects it use as a mitigating factor.

The defendant testified at the sentence hearing and stated that he had been in mental institutions at various times until he was 19 or 20 years of age. He relies upon **Messer v. State**,

330 So.2d 137 (Fla. 1976) and **Miller v. State**, 332 So.2d 65 (Fla. 1976) where we ordered new hearings for sentencing purposed because of failure to afford defense counsel an opportunity to present psychiatric testimony to the jury. The Court in the case sub judice did not declare the reports inadmissible. In fact, the reports had not been received and, therefore, could not be presented to the jury. Neither the judge nor defense counsel could be faulted for the absence of the reports at the jury phase of the sentence hearing.

Defendant knew he had been hospitalized and testified before the jury to that effect. **Stewart v. State**, 339 So.2d 710 (Fla.2d DCA 1976), involved a situation where the defendant did not inform counsel that

he had been found criminally insane while using another name until after his conviction. Stewart is not applicable for it involved newly-discovered evidence while the instant case does not.

There is nothing in the record from which the trial court could conclude that a mental examination would be appropriate. Although defendant testified as to his use of beer and marijuana, there were many witnesses who saw him at various times shortly after the homicide. On each occasion he seemed normal, not intoxicated. Also, there is no evidence that defendant could not distinguish right from wrong. Quite the contrary, his behavior in cleaning up the blood, preparing to flee and leave the area, demonstrates his awareness that his act

was wrong. According to the defendant's statement, he specifically discussed the fact that he was in trouble and the advisability of leaving town shortly after the killing.

The reports furnished the trial judge prior to sentencing included a psychiatric examination made in 1955 when defendant was sixteen years of age. At that time "it was felt that for some reason the patient was malingering in an effort to get a low grade, but that nevertheless he was mildly mentally defective." Three years later the staff diagnosis was "sociopathic personality without mental disease." On April 15, 1958, he was discharged form the hospital and transferred to the penitentiary. There is no evidence of mental illness. From these reports, his observation of

the defendant, and the evidence produced in the case, the trial judge found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. In other words, the trial judge found no mitigating circumstances, so the death sentence was appropriate.

The defendant's attack upon the constitutionality of the Florida statute providing for the death penalty is without merit. **Proffitt v. State**, 428 U.S. 242, 95 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

We have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the evidence does not reveal that the

ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause.

Accordingly, the judgment and sentence of the circuit court are hereby affirmed.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON and SUNDBERG, JJ., concur.

IN THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL
CIRCUIT, IN AND FOR
UNION COUNTY, FLORIDA

CASE NO. 74-71

STATE OF FLORIDA,

Plaintiff,

vs.

RAYMOND R. STONE,

Defendant.

SENTENCE

The sentencing proceeding provided for in Section 921.141(1), Florida Statutes, came on to be heard before the undersigned Circuit Judge and a jury at the Courthouse in Lake Butler, Union County, Florida, on July 18, 1975.

A majority of the jury advised and recommended to the Court that it impose the death penalty upon the Defendant, RAYMOND R. STONE.

The Court has carefully considered the evidence adduced at the first trial, the sentencing trial, the argument of counsel for the respective parties, additional information furnished by the Defendant and the recommendation of the jury, and has determined that the Defendant was afforded a fair opportunity to rebut hearsay evidence, if any.

FINDINGS

The Court finds as follows as to Aggravating Circumstances:

(A) The crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment;

(B) At the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of more than one felony involving the

use or threat of violence to some person;

(C) The murder of JACKQUELINE J. SMITH by the Defendant, RAYMOND R. STONE, was especially heinous, atrocious and cruel;

(D) The Court does not consider the remaining aggravating circumstances enumerated in Section 921.141(5), Florida Statutes, applicable to the Defendant.

The Court finds as follows as to Mitigating Circumstances:

The mitigating circumstances provided in Section 921.141(6), Florida Statutes, are primarily negated, in that,

(A) The Defendant has a significant record of prior criminal activity.

1. By his testimony on direct he was committed to Booneville State

Training School in Missouri in 1951 at the age of 12 where he remained either there, in Algoa Reformatory, or in Missouri State Penitentiary with intervening transfers to state mental hospitals until he was discharged from said penitentiary in 1959. He had been committed as a delinquent following his participation with two other boys, one a younger brother, in binding a young boy and throwing him into a river where he drowned.

2. In 1960 he was committed to Florida State Prison for the offense of robbery. He received a new trial in 1963 which resulted in his recommittal to Raiford where he remained until 1970. (The second conviction has been herein considered, the first only as it relates to time incarcerated).

3. Within 23 days after his release for the offense of robbery, supra, he was in his words "busted again". This resulted in his conviction of and sentence for copulation per os and copulation per anum;

(B) The capital felony for which the Defendant was convicted was not committed while the Defendant was under the influence of extreme mental or emotional disturbance;

(C) That the victim was not a participant in the Defendant's conduct nor did the victim consent to the act;

(D) The Defendant was the only participant in the capital felony for which he has been convicted;

(E) The Defendant did not act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person;

(F) At the time of the commission of the offense the Defendant's capacity to appreciate the criminality to the requirements of law was not substantially impaired;

(G) The age of the Defendant, to-wit: age 36 years, has no particular significance and therefore is not a mitigating circumstance.

ACCORDINGLY, the Court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances which are sufficient to require the pronouncement of sentence hereinafter made.

The Court further finds that considering the facts and circumstances of this case a sentence less than that hereinafter pronounced would be sufficient.

It is, therefore, ORDERED AND ADJUDGED that for this crime of Murder in the First Degree, the Defendant, RAYMOND R. STONE, should be and he is hereby sentenced to death.

The Court hereby advises the Defendant that it is his right to appeal from this Judgment and Sentence within thirty (30) days from the date hereof. Notice of said appeal must be filed with the Clerk of this Court within said time, and the Defendant is further advised that he is entitled to assistance of counsel in taking an appeal. Being heretofore informed that the Defendant desires to appeal and the Defendant being indigent within the contemplation of the statute, the Public Defender of the Eighth Judicial Circuit of Florida is and she is hereby appointed to represent the Defendant in such appeal.

DONE AND ORDERED in open Court at Lake Butler, Union County, Florida, this 1st day of October, A.D., 1975.

/S/ John J. Crews
J U D G E

IN THE SUPREME COURT OF FLORIDA

RAYMOND R. STONE,

Appellant,

vs. MURDER IN THE FIRST DEGREE

STATE OF FLORIDA,

Appellee.

TRANSCRIPT OF AGGRAVATION/MITIGATION PROCEEDINGS

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT IN AND FOR UNION COUNTY, FLORIDA. Case No. 74-71.

HONORABLE JOHN J. CREWS, Circuit Judge.

Gary R. Dunham, Esquire
Assistant Public Defender
317 Northeast First Street
Gainesville, Florida 32601

For Appellant.

Honorable Robert Shevin
Attorney General
Capitol Building
Tallahassee, Florida

REPORTER: Elaine S. Adams

IN THE CIRCUIT COURT OF FLORIDA,
EIGHTH JUDICIAL CIRCUIT, IN AND
FOR UNION COUNTY

STATE OF FLORIDA,

Plaintiff,

-vs- CASE NO. 74-71

RAYMOND R. STONE,

Defendant

TRANSCRIPT OF AGGRAVATION/MITIGATION HEARING

This cause came on to be heard before the Honorable John J. Crews, Judge, and a jury of twelve men and women, at the Union County Courthouse, Lake Butler, Florida, on July 18, 1975, commencing at 9:00 a.m. in open court.

APPEARANCES:

Kenneth Hebert, Assistant State Attorney, 212 Southeast First Street, Gainesville, Florida, for the Plaintiff.

Gary R. Dunham, Assistant Public Defender, 317 Northeast First Street, Gainesville, Florida, for the Defendant.

Reporter: Elaine S. Adams

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(Thereupon, the following proceedings were had:)

THE COURT: The Court has noticed the jury in the box. Does Counsel for the State concede that this is the same jury that we released here last Friday evening?

MR. HEBERT: Yes, sir.

THE COURT: Counsel for the Defendant?

MR. DUNHAM: Yes, Your Honor.

THE COURT: Now, Ladies and Gentlemen of the jury, you have found the Defendant, Raymond R. Stone, guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the

jury, render to the Court an advisory sentence as to what punishment shall be imposed upon the Defendant. The State and the Defendant may now present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine first whether or not aggravating circumstances exist which would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of Counsel, you will be instructed on the factors in aggravation and mitigation that you may consider during your deliberation. The Court

will recognize Mr. Hebert, Counsel for the State.

MR. HEBERT: Your Honor, the State would introduce for purposes of sentencing hearing certain documents and a stipulation between Counsel as to evidence. The first is a Commitment of the Defendant, which I will introduce as State's Exhibit Number One In Evidence, dated 1963, for identification.

THE COURT: Let it be received and marked as State's Exhibit Number One In Evidence.

MR. HEBERT: The second is also a document which is dated May of 1970 and, also, is a Commitment relating to this Defendant. I ask it be marked State's Exhibit Number Two. The third is an Order which is the form of a Retake Order dated April the 8th, 1962,

relating to the Defendant, Stone, Raymond Stone. I ask it be marked State's Exhibit Number Three. There are two matters of testimony which instead of producing the Defendant, Counsel and I have agreed that the testimony from this Defendant, who was a Records Custodian of the files at the Florida State Prison and of this Defendant's files, would show if he testified that the Defendant was released from prison on a expiration of sentence contained in the earlier exhibits on January the 8th, 1970, and that he was released again on the date of 11/9/1972 from the second piece of evidence, which I just introduced. Those two dates we have released and stipulated into evidence. That would be the testimony of what the witness would say if he had to come.

THE COURT: That was the Custodian who was here but you let him go?

MR. HEBERT: He is here, Your Honor. We are saving time. That is all he can testify to.

THE COURT: All right.

MR. HEBERT: With that, Your Honor, the State on its aggravating circumstances evidence portion would rest.

MR. DUNHAM: May the Defense proceed, Your Honor?

THE COURT: Yes.

MR. DUNHAM: Call Raymond Stone to the stand.

Thereupon, RAYMOND R. STONE, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUNHAM:

Q. Mr. Stone, would you give us your full name?

A. Raymond R. Stone.

Q. And your present address, please?

A. Box 747, Starke, Florida.

Q. Is that, in fact, part of the Division of Corrections?

A. Raiford State Prison.

Q. How old are you, Mr. Stone?

A. Going on thirty-six.

Q. What is your educational level? How much formal education have you had?

A. Third grade.

Q. Mr. Stone, what I would like you to do -- can you tell the jury, please, first of all, where you grew up as a child?

A. Mostly in an institution.

Q. I mean before that?

A. In the state of Missouri.

Q. Can you tell us, then, the year you were first put in any sort of state institution?

A. 1951.

Q. How old were you at the time?

A. Twelve.

Q. Do you remember the name of the institution? Where it was?

A. Booneville State Training School.

Q. Would it be proper to describe that as an institution for juveniles?

A. Yes, sir.

Q. How long did you remain there, please?

A. About nine years.

Q. Until you were how old?

A. About nineteen or twenty.

Q. Would you explain, please, where you went after that?

A. I was sent to a mental hospital.

Q. What would the name of that be?

A. Fulton, Missouri.

Q. Do you remember the name of the hospital?

A. Fulton.

Q. I see.

A. State Hospital Number One. No, Number Four.

Q. After you were at that state hospital, where did you go?

A. I was transferred back.

Q. Where?

A. Booneville.

Q. How long did you remain there?

A. About four or five months.

Q. What age are you now?

A. Going on thirty-six.

Q. I mean, when you went back to Booneville for the second time, how old were you at that time?

A. Going on seventeen.

Q. Where did you go after that?

A. I went to Algoa Reformitory.

Q. Where is that located?

A. That's about twelve miles west of Jefferson City. Capital up there in Missouri.

Q. How long did you remain there?

A. About a year.

Q. Then where did you go?

A. I was transferred to Missouri State Penitentiary.

Q. How old were you at this time?

A. About nineteen, I guess. Eighteen or nineteen. I don't know for sure.

Q. Before you went anywhere else, how long did you remain at Missouri State Penitentiary?

A. About six months.

Q. Where did you go from there?

A. To Fulton State Hospital Number One. Mental hospital.

Q. Where is that located?

A. That's about thirty-eight miles from Jefferson City.

Q. How long did you remain there?

A. I don't know.

Q. Well, do you remember about -- well where did you go next?

A. I went back to the penitentiary.

Q. When did you finally get out of custody?

A. In '59.

Q. How old were you at that time?

A. About nineteen or twenty.

Q. So you had been continuously in an institution from age twelve to age nineteen or twenty?

A. Right.

Q. Now, records have been introduced to the jury, but so the jury understands, when was the next time you were institutionalized in any state

correctional institution?

A. 1960.

Q. Where was that?

A. Florida State Prison.

Q. Where were you housed?

A. At the rock.

Q. Here in Union County?

A. Yes, sir.

Q. How long did you remain there?

A. I got out -- I went back for a new trial in '63 and came right back. Then I got out in '70 and stayed out twenty-three days.

Q. Then what happened?

A. Then I got busted again.

Q. Were you finally sentenced?

A. Yes, sir.

Q. Where did you go then?

A. Back to Florida State Prison.

Q. Do you remember what year that was?

A. Seventy.

Q. When were you released?

A. In '72.

Q. Can you tell me if your parents were alive, your mother and father at the time that you were first institutionalized?

A. My dad is. My dad was. I don't know -- I ain't heard from him since '55. I quit writing to him.

Q. How old were you at that time?

A. About sixteen or seventeen.

Q. Do you have any brothers and sisters?

A. Yes, sir.

Q. Have you been in communication with them?

A. No, sir.

Q. When is the last time you contacted or communicated with them.

A. About 1955.

MR. DUNHAM: I have no further questions.

MR. HEBERT: I have no questions.

THE COURT: The Court will recognize the State.

MR. HEBERT: Are you through, Mr. Dunham, with your presentation of evidence?

MR. DUNHAM: For the record, we are through.

MR. HEBERT: Ladies and Gentlemen, the purpose of the hearing now as the Judge has informed you is for you to recommend a sentence in this case. The Legislature, in its wisdon (sic) has attempted to help you in making that recommendation to the Court by listing certain things which you should consider and while

you may consider the death penalty as a principle or as a theory or as a right or wrong thing, whether you recomment (sic) it or not should largely be based on whether you find certain mitigating circumstances present to outweigh them. They have made a list of what aggravating circumstances are and what mitigating circumstances are. It is from these that you should largely find the evidence on which to base your recommendation. I believe the Court will instruct you that aggravating circumstances include, One. The fact that a capital felony was committed by a person, which you have already found to be true under -- by a person under sentence of imprisonment. Now, that does not say that the Defendant, the person

who committed the capital crime, has to be serving a sentence at the time in the institution. He doesn't have to be in custody serving.

MR. DUNHAM: Your Honor, I'm sorry, Mr. Hebert. It is my opinion that he is now giving legal opinion to the jury as to what that means and what it doesn't mean. I think the instructions on the law properly belong with the Court. I object to his going into this -- into this area and I would like to state my reason. I don't know whether we should ask the jury to be excused or what, because I stated previously that I was going to have an objection to Mr. Hebert going into this particular area.

MR. HEBERT: I understood that the Court had ruled.

THE COURT: As to the area of whether it is a question of law, whether he was under sentence at the time of this capital offense.

MR. HEBERT: Yes, sir.

THE COURT: Mr. Dunham did register his objection and he can state them now if he wants to or he will be permitted to delay it and it will be the same as if he had stated them right now for the record.

MR. DUNHAM: All right. Well, my first objection is because I was under the understanding that Mr. Hebert was interpreting what that means. I don't think that is properly --

THE COURT: Well, Mr. Hebert's remarks on the law is not the jury's instructions on the law. The Court will give the instructions.

MR. HEBERT: I didn't mean it to be that way, Judge, and I wasn't intending to instruct the jury on the law; simply to state to the jury the interpretation of the factual evidence as fits under that legal definition and the Court, of course, will give any instruction on the law, but I have to relate how my evidence applies to this aggravating circumstance.

MR. DUNHAM: All right. As long as the Court has already instructed the jury that it is the source of the law and not Mr. Hebert's interpretation, I'm satisfied.

THE COURT: Yes and you will be permitted to state your objection for the record on that other matter.

MR. HEBERT: All right. The first aggravating circumstance which you may consider in this case is whether this capital felony, the death of Jacqueline Joanne Smith, was committed by a person under sentence of imprisonment. My explanation to you is that it does not say a person who was in prison serving that sentence. It says under sentence. The reason I mention that to you is because introduced in evidence before you are several documents, one of which shows that the Defendant was in the Florida State Prison under a sentence from Volusia County for the crime of crime against nature. He was committed

there in May of 1970. The testimony which has been stipulated to you is that he was released from this Court Order or this imprisonment on November the 9th, 1972. While he was out of prison, based on a Court Order, this crime was committed. While he was out and prior to this crime which he committed taking place, there was what I call a retake Order. State's Exhibit Number Three, which comes out of the District Court. As you read it the Court reversed a lower Court that let him out of the prison saying, take him back. He is under sentence. Stating the Attorney General for the State forthwith return Petitioner to custody for the balance of their sentence. So that on April the 8th of 1974 there is a

valid commitment order and a sentence that this Defendant is under. April the 8th, 1974. The death of Jacqueline Joanne Smith was on August the 23rd, 1974. This was in effect and this Defendant was under a valid sentence at the time this crime was committed and that is what this aggravating circumstance says. That the crime was committed, the capital crime, by a person under sentence of imprisonment. Now, when the Legislature made this, obviously they were intending to include and they were thinking about those persons normally in prison at the time a crime was committed, like killing a guard; but, they didn't limit it to that. They didn't say an aggravating circumstance is only when you are in prison, itself, and

killing somebody. They extended it to something further because they said under sentence. Obviously, this was to include areas where people can be out of the prison and commit crimes and it be just as bad, just as much an aggravating circumstance. For instance, if a person is under a sentence escaped and committed while on the outside or if a person were on parole and committed a crime outside. What I am suggesting to you is that the same is true if a person is released for Court Order to be outside of the prison because what the Legislature is attempting to control and what they are saying is an aggravating circumstance is a certain class or character of people. Certain kinds of people. Those who have been

sentenced before. Those who have committed past crimes. Those people who are presently under sentence are different kinds of people than you and I. Law abiding people. Because of that classification of person, they should be treated different. They are more dangerous. They are more of a threat to society. This Defendant fits that category. He is under a sentence and this crime is committed while he is under that sentence. This document is proof of that fact. Now, whether he knew of that, that is to say whether he knew that the sentence was reinstituted has no bearing in my opinion on whether this is effective or not. That is to say, the Defendant was, in fact, not brought into custody on this Order until he was picked up in

Missouri. You remember the testimony from the case. He was brought back from Missouri on a charge that the prison had. That is this. That was September the 1st, as I recall, or maybe the last part of August, that he was picked up on this. But he was under this sentence during that time whether he knew it or not. I contend, and I am saying to you, that the Legislature is talking about a category of people. That is why they make this an aggravating circumstance. Whether the Defendant knew this was in existence or not, he is still that category of people. He has been sentenced and he is under a sentence when he commits this crime and that kind of people, that kind of person, that category is different and it is an aggrava-

ting circumstance, which you can find, and if you find it to be true, is a consideration for a death penalty in this case. Now, in addition to that, I believe the Court will tell you another category of aggravating circumstance is the fact that the Defendant was previously convicted of another capital felony or a felony involving the use of threat or violence to the person. Now, I have two documents that I was going to introduce to you, and I will speak of them now. The Defendant's testimony from the stand almost makes that unnecessary for me. He has told you that since age twelve he has been in one prison, or one institution, after another. I think that tells you of the kind of person you are talking

about when you talk about previous criminal activity. One of the things you see, which is a mitigating circumstance, is the Defendant's lack of previous criminal activity. From this testimony on the stand today as I interpret it from his mouth, there has been criminal activity on his part since age twelve. The first one, which you have here is a conviction of this Defendant on December the 10th of 1963 for robbery. Robbery. It's the kind of person -- kind of crime we are talking about. Not petty larceny or shoplifting. Robbery. That kind of conviction. 1963. 1970. Florida State Prison, again. This time on a Information Two Counts and sentenced on both counts to five years per

count for crime against nature. What we used to call -- well, the first one charged copulation per os and the second one, copulation, per anum, which means rectum. Crime against violence. Crime of violence. What it shows you is that you do have not only a person who is under a present sentence when he commits this crime, but a person whose background is full of violence because he has gone through courts just like he did today in this case and been convicted or plead guilty and he has been proven guilty either by his own mouth or a jury verdict on both those occasions and sentenced. What you see, then, from the compilation of evidence is the fact that in December of 1963, he was sentenced to ten years for

robbery. On January the 8th, 1970, after serving seven years of that ten, he is released. January the 8th of 1970. On May, the 27th, of 1970, four months later, four months later after getting out of prison after serving seven years, the full time for gain time and the rest on the robbery charge, four months after he gets out, he is sentenced from Volusia County for crime against nature. He is released then in November of 1972. Two full years later after this, and that is the release based on a higher court, which released him from this crime against nature sentence for some reason. He was out on that release when the Supreme Court reversed that lower court and said, no. On April 8, 1974, the Supreme Court says no,

you are going to go back and serve your sentence you are presently under. Now, I hope that is not too confusing to you; but, it's important. The time schedule of when he is out and when he is in because it shows you that he is a person who has been involved in criminal activity. He is a person that has got a past record. He is a person who is presently under sentence at the time he murders Jacqueline Joann Smith. Those are aggravating circumstances. Two of them to consider. Now, in the end, if you find these aggravating circumstances to be true beyond a reasonable doubt, you are going to have to find that the mitigating circumstances outweigh these or else your verdict should be death. You

are weighing aggravating versus mitigating. Now, the third thing that the Court will talk to you about as an aggravating circumstance is that the capital felony was committed while the Defendant was engaged or was an accomplice is (sic) a commission of or attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb. Now, your verdict found this Defendant guilty of premeditated murder. I don't know that this is an aggravating -- I don't know if this is a circumstance that you considered or not because I don't know what went on in the jury room. You had the

opportunity in an instruction to find him guilty of what we call felony murder. Murder during the performance of a kidnapping. Your verdict spoke only of premeditation. I don't know whether you found beyond a reasonable doubt that he was also guilty of the kidnapping. So I can't argue that to you. You know that. If you found that to be proved true as well as the fact of premeditated murder, then, it's an aggravating circumstance you can pile on top of what has already been shown to you. I think the court will tell you that there is another circumstance to consider and that is that this capital felony was especially heinous, atrocious or cruel. Now, Ladies and Gentlemen, the facts of the case you are

already familiar with. I don't have to go through all of these photographs again. I think you recall; but, a couple of things I want to mention to you about the case because I do believe that this case is especially heinous, atrocious and cruel. You will recall from the evidence that the Defendant had taken Mrs. Smith from the field. From the Sheriff's testimony we don't know exactly how long the ride took to the bridge but somewhere along there he had stopped her and punched her around a bit. Her nose had been bleeding and then admits to hitting her one time. In the first statement he says if I hit her more I don't remember. I could have but I don't remember. The second time he said he recalls hitting her in

the front of the head. Now, you have got a calva with a hole the size of what, a quarter, at least, in the front of the head and another one in the back of the head at least the size of a elongated quarter. One in the back of the head and an indentation on the top. There is no doubt -- well, if the Defendant's own mouth speaks these words that at the time I threw her from the bridge she was still alive because I could feel her heart pound, which means that these blows were inflicted prior to death. Certainly I feel they would have rendered any more unconscious. Still alive in his own words. Then the additional blows you can see by the severity of them what that woman must have gone through. While she was still

alive -- I don't understand but he is continuing to bang these traumatic holes in her head and then, of course, not being satisfied with that as a fact, throws her then into the bowels of the water and the alligators to finish. While he knows that she is still alive. Although probably, certainly, dying, but still alive. The death penaly (sic) is something that is, of course, the most severe of all punishments. I would like to speak to you just a minute about the death penalty itself and its application at all and particularly to this case. You know, in recent years peoples of this nation have been surfeited with various amounts -- quantities of written and spoken affirmations of individuals' rights.

It's an immensely popular and it's quite valid then. Editorial writers write about it. Educators lecture on the subject and elected officials vow to protect it. Americans cherish their freedom and they guard it zealously. When someone cries out that their freedom has been infringed on it draws quick attention; but, have you noticed that there is some fundamental rights that have been largely ignored in all those discussions about the right of people to remain alive. The right of people to remain secure from the assaults of other persons. The peoples' right. The right to enjoy the material things that a person accumulates through perspiration and honest sweat. The right to walk on a

street or a public park and conduct your daily affairs without fear of death or great bodily harm. To most people crime statistics are probably not truly meaningful. It's something they probably find remote and abstract and it calls for disapproval of course, but it doesn't get any direct action. However, you and I know because you have been a juror in this county and in this whole case, that there has been a crime and that that crime is not a remote thing. You know that it is by no means abstract. You know that it can destroy human life. People make people bleed. Take whole savings. Life savings. With all the writing about the death penalty and whether it is appropriate at all, cruel or unusual or should be

imposed by anybody these days, I want you to know it's my opinion the majority of Americans have decided in favor of having a death penalty and that it is appropriate by the Constitution and the law. Forty of the fifty states have reenacted the death penalty by the legislature which are spokesmen for the people in those states. One of those states is Florida. I say that also because just recently the United States enacted an air piracy law connecting it with the death penalty. Those are the elected representatives that speak the peoples' voice. Interestingly enough, of those forty states who have the death penalty and in the beginning fifteen states when this controversy came up abolished the

death penalty and since that time, eleven of those fifteen states have reenacted the death penalty itself. I might add, too, in the ten year period we have crimes increased of murder and serious rape. I say too, because in a decision called Furman vs. George, which was not too long ago, there was some specialization or writing in newspapers that the death penalty had been outlawed by the Supreme Court. You might remember that it wasn't that long ago and Florida reaffirmed the death penalty since that time. In fact, the readings of that case show that it wasn't an accurate interpretation of the death penalty. It was not actually abolished. It was inflicted discriminatorily. It was held by the court to be improper.

Speaking about the right of people to have a death penalty. Justice Powell on the Supreme Court in that Furman case said, "The second and even more direct source of information reflecting the public's attitude towards capital punishment is the jury." It is noteworthy that during the 1960's juries returned more than two thousand death sentences. The reason I mention that to you is because when you read the rights of individuals in the newspapers or in the editorials which say that the death penalty is something illegal, that doesn't speak the mouth of the people. You and the other jurors around the nation certainly jurors in the 1960's didn't believe or agree with those editorials. Two thousand of

those people speaking from the jury boxes throughout this nation returned the death penalty. Florida has reenacted from its legislature it as a valid sentence. People called for it and wanted it because it is appropriate in certain crimes and certain crimes require the death penalty. In a sense you see, the criminal has taken his own life when he commits a capital crime. Society is responsible for the safety and security of its members and it has a right to remove a person who threatens that safety and security. It is incorrect, in my opinion, to speak of the justification of the death penalty only in terms of a deterrent. Some people say that one way you can justify having the death penalty is that it is a deterrent to

other people. There are statistics on both sides of that story but I don't want to argue. I do believe the death penalty is a deterrent though, and that is a valid justification for it; because I know two things. One, talk with law enforcement officers around this state. My own personal knowledge of these facts in talking with other prosecutors, we all know of more than one who in the process of a crime didn't further -- didn't pull the trigger, didn't kill the victim because if they did, they knew that there was a death sentence involved. If it deters one person in this state from committing a crime, it is a deterrent. Just one. Second, all I know for sure that it is a deterrent on the person who receives

that sentence because society will no more be inflicted by his crimes upon us. But, an additional and equally good justification for that death penalty is the fact that society expects retribution. Retribution means simply that certain crimes deserve certain punishments and whether it is a deterrent or not, it should be inflicted because of its severity.

THE COURT: That is, if the aggravating circumstances are proved beyond a reasonable doubt and the mitigating circumstances do not outweight (sic) that.

MR. HEBERT: Yes, sir. I was speaking really as to the theory of it. But retribution punishment for an offense is not wholly unworthy or an

ugly reason for inflicting a crime. The punishment in this case must meet the crime and whether you say it should meet the individual or a crime in this case because the Defendant -- the kind of crime we are involved with here, the punishment should meet both. What I mean to tell you, of course, is not that all first degree murder crimes deserve the death penalty. For instance, while a shooting occurs between spouses, while legally it is first degree murder, it is forgivable. There are still mitigating circumstances as to why the shooting occurred even though it is unjustified. The fact is that mitigation circumstances in this case are not present to outweight (sic) any of the aggravating circumstances. You

know, people talk of an atrocious and cruel crime. I say, in my mind, this is atrocious and cruel because of the suffering that was inflicted on this woman. The way the Defendant pounded that skull. I don't know what was in the mind of that Defendant to do that. The effort that he had to go through to put that body in that condition. What he did with her prior to getting on that bridge and what point all these blows were inflicted, I just don't see how you can say it is not atrocious. It's wicked and it's cruel. The only way I know to put it in these terms. If your dog had rabies and had to be put to sleep, would you kill the dog the way that he hatcheted that woman? I mean, if your answer is

no, then in your heart -- in your heart, you know that killing in any manner is atrocious. It's cruel. It's unnecessary. It's heinous. I think if another prosecutor I knew, Ted Duncan, were here he would probably tell you to look at this Defendant and say, you made your bed, it was your choice, now, lie in it. If the shoe fits, wear it. If the crime is what we have shown it is, then the punishment must fit it. You know, none of us like why we are here today; but, I remind you that we are not here today because of any act on the part of the dead lady, anything that you have done or I have done, but what -- or the Court, but what this Defendant brought on himself. In fact, everyone has done their best to get it to the posture

it is right now for you. The Sheriff has labored long and hard to prove this case and the Defendant's guilt. He has done a fantastic job. Everything he could do along with Joe Uehbler. They have shown that the guilt is there. I have presented the case to you as well as I know how to do consistent with the ethics and my knowledge of the law. The Court has sat here and guaranteed that the Defendant had a fair trial. Everyone has done everything that they are supposed to do and none of us can go any further now. Now, it is up to you and what you have to decide is where we stand. The death penalty is not something you should run from even though you do not enjoy it. You have the responsibility and we can't

do it for you. You must face up to that challenge. You must be able to say in yourself, I can do it if this is the case. Ladies and Gentlemen, when you weigh the aggravating circumstances and you weigh the mitigating circumstances, I submit to you that you are going to find the aggravating circumstances far outweigh the mitigating circumstances. One, the capital felony was committed by a person under sentence of imprisonment. Two, the Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. I don't know your finding as to whether kidnapping was involved, whether you can add that or not. And the other one I know you can add. In my

opinion from the facts of this case, is that this case, this capital felony, the slaughter of Jacqueline Joann Smith was particularly heinous, atrocious and cruel. Now, the Defendant is going to be able to argue to you mitigating circumstances. A, the Defendant has no significant history of prior criminal activity. I don't see where he can argue that to you. That is not a mitigating circumstance. He has showed that he has got a prior history. A second mitigating circumstance is that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. I don't believe that. There is some testimony by the Defendant that he had

smoked marijuana cigarettes. If you believe that part at all. The other testimony was that at three o'clock in the morning when he showed up at Bertha's that night at the truck stop he looked stone sober then. Completely sober. He talked normally. Looked okay. There was no three marijuana cigarettes and two six packs of beers effect at three o'clock in the morning. The killing had to happen at twelve-fifteen or twelve-thirty. If he was smoking marijuana and drinking beer that has got to have some effect on him at three o'clock in the morning. You are going to have to search your mind to say that that is a mitigating circumstance. C, the victim was a participant in the Defendant's conduct or consented to the act. No

reasonable person is going to believe that argument that Jacqueline Joann Smith agreed to what happened to her. Another one would be that the Defendant was an accomplice in the capital felony commited by another person and his participation was relatively minor. There is nothing of that in there. The Defendant acted under extreme duress or under the substantial domination of another person. There was nobody else involved. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. I suppose why the testimony has been that he has been in jail all his life. The fact that he has been in prison all his life

does not mean he doesn't know the difference between right and wrong. There is nobody here to say to you -- there is no doctor that says he is insane or that would be in (sic) issue in this case. It is not present at all. That fact was never conducted. The law presumes him sane unless the defense shows you some evidence otherwise. There is none in this case. So, I submit to you that that fact of mitigation is not present in this case. The last one is the age of the Defendant at the time of the crime. That is supposed to be a mitigating circumstance. I think that has got to mean for very young kids. That does not fit here. I say to you there are no mitigating circumstances in this case. So, if your

judgment is according to the law, the aggravating circumstances outweight (sic) by far the mitigating circumstances and so by law you should return the death penalty. The other argument I made to you was because I want you to know that the death penalty is not something you can run from. It's something society expects and in certain cases because if the crime is committed and it is committed with these aggravating circumstances, then the punishment has got to fit it, and you have got to declare it for the aggravating circumstances. No mitigating circumstances. Unless you find that the mitigating circumstances override -- outnumber these aggravating circumstances and you

believe those aggravating circumstances are there then by law and you are sworn as a juror, you should return a death recommendation. By consideration and by willpower and because it is the punishment that fits this crime you have to have the guts to find the death penalty. You are the voice of this community. The people await your recommendation.

MR. DUNHAM: If it please the Court.

THE COURT: Mr. Dunham.

MR. DUNHAM: Ladies and Gentlemen, Mr. Hebert and myself, once again, are only making persuasive arguments. What Mr. Hebert says isn't the law and what I say isn't the law. He poses an interesting question and that is, is there a

nice way to kill anybody? Of course not. There is not a nice way. Insofar as execution when the state has decided it can't take a life they haven't even resolved a nice way to kill somebody. Some people hang, some people use the gas chamber, some people use the firing squad. In Florida, they use the electric chair. If you think about it none of those are very nice ways. My duty last night was to try to put together an argument to convice (sic) you the opposite of what Mr. Hebert believes, because, of course, this is an advocate kind of a situation. He is arguing one thing. I am arguing another. It's up to you all. I agree with Mr. Hebert there. I thought Mr. Hebert was going to skip it over but he finally

but (sic) it in and, that is, since there is no nice way of killing if you went along with his original line of thinking, it would seem logical that the Legislature would just say anytime (sic) there is a conviction on premeditated first degree murder then he shall be executed. He or she. But the Legislature didn't do that. Why didn't the Legislature do that? I think it's -- I submit to you that it is for this reason. When you sat as jurors and listened to the facts and the Judge instructed you on that, it was your duty at that time to put together the facts and find out whether or not he was responsible for her death and whether or not it was in a premeditated design. The facts were presented to you.

You reached a conclusion. You found the man guilty. That is a factual situation. You based your verdict on the facts, the evidence and the testimony and the Court's instructions on the law applied to those facts. The Legislature then determined that the jury can give an opinion to the Court. Since the Legislature gave two options either death penalty or the life imprisonment and the statute says life imprisonment and a mandatory twenty-five years before elgibility (sic) for parole. It's not a life sentence where he is going to be out in two years. If you recommend a life sentence the law says that he must serve at least twenty-five years before being eligible for parole. He is thirty-five years of

age now. In twenty-five years that is going to make him sixty years old. But the Legislature said, and they are our elected representatives. They are the ones who decide what the laws of this state will be. It's an either or situation. Someone has got to decide. Now, they give some circumstances which Mr. Hebert read through all of them on both sides. Aggravated and mitigating circumstances. I don't feel, and I submit to you, that it's not a question of numbers. In the statutes itself, and the Court is going to read to you in detail what the aggravating and mitigating circumstances are, they list eight aggravating circumstances and seven mitigating circumstances. I submit to you that

it is not a question of numbers. What the Legislature is asking for is this, in my opinion. You have listened to the facts. You know the circumstances surrounding the death of Jacqueline Smith. You have made a factual determination. Since you are familiar with all those facts, it is now up to you to weigh aggravating and mitigating. It's not a question of numbers. It's not a question, I don't believe, of pruning a and d and f and g and saying, well, we've got four here and maybe he can only show one or Mr. Hebert is arguing, none. It may be that there are a lot of mitigating circumstances, but that one of the aggravating circumstances is so overwhelming, say in the case of a mass murder where ten, twelve,

fifteen people are killed by the same man. That is only one mitigating or aggravating circumstance, but that may overwhelm all of the mitigating circumstances. On the other hand, there may be a lot of aggravating circumstances but under one of those categories there may be so much mitigation that it overcomes and overwhelms the aggravating circumstance. What I am saying is this. It's not a question of numbers. It's a question of weight and what the law seems to be asking for is a gut reaction. For you to give your gut reaction based on these factual considerations as to what you feel the penalty ought to be under the circumstances. As I indicated before when I said is there a nice way to kill anybody,

the Legislature puts down that it was especially heinous, atrocious or cruel. Every murder is cruel, atrocious and heinous in the sense that it deprives the individual of their life. There is no way to bring that back. It often times disrupts families. It often times creates all kinds of situations. The reason they put something like that in the statutes is because there are murders which are more cruel than other murders. What you have got to weigh are the circumstances of this case against all the factors presented. Now, insofar as what Mr. Hebert had to say and, I hope you understand the circumstances too, it is a little confusing; but on the first aggravating circumstance, that is that

the capital felony was committed by a person under sentence of imprisonment, at the time that Raymond Stone was working for the Smiths and living in their trailer, he was not serving any sentence. He was released by a court of the United States. He was not on parole. He was not an escapee. He was out. He was a free man. I submit to you that that does not then fall under a person under sentence of imprisonment as a man who would be an escapee or a man who would be a parolee because he is still then serving a sentence. He is under the authority of the Division of Corrections or the Probation and Parole Commission. If he violates it, he can be brought back to prison. At the time that the evidence has

convinced you that he committed this murder, he was a free man. He was not serving under a sentence of imprisonment. Now, there is some legal technicalities involved, which are a little confusing; but the fact remains that he was out legally. He was a free man. He didn't have to report to anyone and until he was arrested, until he was made aware of the fact in Missouri the higher court had said no, the lower court was wrong and you have got to come back and serve this sentence, I submit to you he was a free man. I do not deny because the record is clear that the Defendant had been previously convicted not of any capital felonies but felonies involving the use or threat of violence because robbery -- a

necessary element of robbery is force or violence or the threat of violence be applied. Insofar as the kidnapping, as Mr. Hebert indicated, you did, in fact, reach your verdict. You had two two (sic) choices insofar as first degree murder. You had premeditated design and you had murder while engaged in a kidnapping. I submit to you at least for the consideration of aggravating circumstances that number one, first, you have to be convinced that a kidnapping was taking place. Secondly, as I understand the jury's verdict, you all reached a verdict, a unanimous verdict that he had already formed the intent to kill her. Well, of course, if you are going to form the intent the question is, where am I

going to do it? Am I going to do it in the home in front of the children or am I going to do it in front of the husband? Obviously, once you decided he made the premeditated opinion, I submit to you where he did it doesn't make a whole lot of difference. Then, of course, there is the discrepancy by his version of the tape which I am assuming is part of the evidence you used in which to convict him because he says on tape that he did do it and explains how he did it, but he also said that she got into the car voluntarily. Now, Mr. Hebert passed over some of the things that didn't apply but I think it's important to apply in this case. When they are talking about a cruel or unusual murder, in my opinion, and I submit to you that it

is something to be considered, we are talking about, for instance, someone who has murdered in the course of a robbery. In other words, the purpose of attacking the person in the first place was to get money for themselves and it is not that that is not bad enough because that is a crime in itself, but then they went ahead and murdered the person. That is atrocious and cruel and a selfish type thing. Mass murders, I have mentioned before. Torture murders. Where there was extensive torture before someone was killed. There is no doubt about getting around the fact that there has been a murder. A murder is a horrible thing. The question is whether or not this particular murder was especially and that is

the language, especially heinous, atrocious or cruel. By putting especially in there the Legislature understood that there is never a nice way to kill anybody. All right. Mr. Hebert has a certain advantage at this trial that doesn't or would not occur at most trials. First of all, I would hope that the jury, all of you, and I'm sure you are, are reasonable enough to understand that as horrible as those pictures are, those pictures have to do with the corpse after death in the water for several days and attacked by alligators. In other words, it is horrible. The pictures are horrible and they are going to stick in your mind; but, Raymond Stone didn't decapitate that body or cut the hands off or disembowel the

body. The doctor's testimony was that that was the alligators. The way you saw the body is the way it was. I submit to you, therefore, that the condition, the circumstance under which it was found, is not an aggravating circumstance. Now, I say Mr. Hebert has an advantage in this sense. Normally, or course, when there is a murder the family gets the body, the body is buried and that is the end of it. Well, he can flash this skull up to you which he did again today because of the circumstances of the decapitation and the finding of the skull later on, don't be swayed -- you have determined guilt. You have determined that he is guilty. The question is now what the sentence is going to be. Don't let a skull with

holes sway you except in this sense. That is the next issue I want to get to. According to Mr. Stone and the taped confession and that is the only evidence we have got as to actually how the murder took place, where it took place and how it took place, it took place on Cox's Bridge. As I understand the statements that were played, Mrs. Smith was rendered unconscious from the first blow. If she was rendered unconscious from the first blow, then anything that happened thereafter, she was not aware of. The testimony was that he hit her, she dropped. He dragged her over to the bridge and pushed her in. So the fact that that skull may have two or three holes and I ask you once again to consider circumstances of the

finding of the skull and all of that, but the testimony was that there was one and I believe the doctor's testimony was that any of those blows would have been sufficient to cause death because they actually put holes in the skull and the damage they would have done. So, I submit to you that Mr. Hebert's argument falls through in that sense. Of course, it's horrible and, of course, it's terrible; but is it especially horrible and terrible under the circumstances? Did she suffer a great deal or did she not? I submit to you that according to the evidence that you had and that you have been able to listen to, that she was rendered unconscious from the first blow. All right. What I

would like to get into now -- that was just to answer some of Mr. Hebert's arguments. What I consider to be valid consideration on mitigation. All right. The reason I put Mr. Stone on the stand is to let you understand the following things. We talk about -- we talk about the formative years. I think any psychologists, anybody trained in this area of child development -- the testimony, the uncontested testimony that Raymond Stone, the Defendant who is before you today, was incarcerated in institutions, reformitories for juveniles, prisons, state mental hospitals, continuously from the age of twelve to the age of twenty. This is the greater part of his formative years. He was not in and out for various

crimes. He was in from age twelve and didn't see the light of day until age twenty. Now, Mr. Hebert has been quoting a lot of statistics about this, that and the other. I am going to be getting into some of that in a moment. Ladies and Gentlemen, I think it is pertinent to consider going towards mitigating circumstances, the fact that here is a twelve year old boy separated from what family he had and then losing contact, I believe he testified it was 1951 when he was first incarcerated and lost all contact with his family in 1955. Four years later when he would have been fifteen or sixteen. The man is a product of our institutions. Now, I am not saying that people who work in Corrections and who work with

juveniles and who work in the state hospitals don't do their jobs. Everyone knows they are overworked. They work as hard as they can but because of funding and other problems I think that it's just as valid to show that there are statistics that rehabilitation is failing. There is a lot of discussion about that in the editorial sections of the paper, and what is the purpose of punishment? Is it to rehabilitate or is it merely to punish the person for committing a crime. People argue on both sides. I think statistically it can be shown that rehabilitation at least is a failure and here is a twelve year old boy who is institutionalized from age twelve until age twenty. That is the only background

he has. That is the only family he has are the people who are in charge of him. The evidence is uncontested from Mr. Stone's own statements that on at least two occasions for a period of time he was confined to mental institutions. Now, I did not present any evidence as to what the nature of the conditions were, but the fact remains that someone in charge of his well being and his future determined on two occasions that he needed institutionalization out of the prison and into a mental institution. He was shifted around so to speak. He started out in a reformitory. He went to another reformitory. Then he went to a mental institution. Then he came back. Then he went to prison. Then he went to another mental

institution and then he came back. Ladies and Gentlemen, if that is not a mitigating circumstance, I don't know what is. This wasn't a man who enjoyed the privileges of his adolescence like you and I did out on the streets with a family to raise us and to see to it that we got the proper education and right moral values and the right training and the right education. Now, let's go up to now. The crime for which he was convicted. Once again, I submit that under the mitigating circumstances all these, in fact, do fall within the categories. There is some technical categories that it doesn't fall in and I want to go over those in just a moment. The testimony was that the Defendant was operating under the influence of

alcohol and marijuana cigarettes on the night in question. He even talks about -- because he was questioned about how many times he hit Jacqueline Smith and he says if I hit her more than that, I don't remember. I don't remember Why didn't he remember? What happened? Now, Mr. Hebert said that for a certainty, and I submit he is not an expert and if he could prove it he would have experts here, that if a man is smoking marijuana cigarettes and drinking beer at twelve o'clock, he must necessarily show the effects of that three hours later. I don't know and I submit to you he doesn't know what the effects are and how long they last. That is for an expert and you don't have an expert today. Bertha Wright testified that

she only saw him briefly and I don't even remember her saying she had a discussion with him. Only that she remembered seeing him there and that it was just a brief encounter. Then there is the question of a motive because the aggravating circumstances go into things such as pecuniary gain. That is doing it for money or for insurance or something like that. The State made a great point and the law was properly applied, motive is not necessary for a conviction. By the same token the State has and I think that is a mitigating circumstance, shown you or the evidence has not shown any real clear cut motive. Why did he do it? Was it because he was trying to get even at Marvin Smith for something? What was the

reason? Why did he do it? It seemed to me that the evidence showed that it was at best a senseless killing, an unplanned senseless killing that came up at the spur of the moment. From the evidence that you have heard at least. Mr. Hebert went into what might be called philosophical or political arguments about the death sentence. When it is to be applied and when it is not and what it is for and what it is not for. I don't think we want to make this case a political issue because, once again, we are dealing with a human being. You have determined his guilt. You have determined he is guilty of slaying Jacqueline Joann Smith. No doubt about that. That part can't be undone. The question -- Mr.

Hebert spoke about retribution as opposed to rehabilitation. I think the reason he did that, he quoted some statistics and he passed over the fact that there are statistical studies that compared states which didn't have the death penalty and states which did and from those statistics and that is what he said. I agree with him as to whether or not it can be proven that the death penalty does in fact prohibit other people from killing other people. I think it is inconclusive and I don't think you can deal with it on that level. All right. Is it for retribution? Basically when you deliberate I can't see how your decision cannot be affected by your own moral values. You are going to have to make some sort of moral

judgment. Under the facts and circumstances, under what the Court gives me in applying and what I know about this case, do the aggravating circumstances outweigh the mitigating circumstances and can I, therefore, make -- morally justifying a decision for the death penalty. All right. When you are taking retribution, what is the retribution for? Well, obviously because Jacqueline Joann Smith's life is gone and it cannot be brought back. He says an eye for an eye. Well, in a sense that is what he is saying. He took her life away. Therefore, we should take his life away. An eye for an eye. The Old Testament of the Bible. I submit to you that there is another side to the coin. The New Testament

of the Bible says turn the other cheek. It's a difficult issue. It is something at least at this stage of the game that is almost a heavier responsibility than that which you had earlier. Because earlier you were basing it on facts. Now, we are deciding whether or not aggravating outweight (sic) mitigating. You have got the facts but you, individually, have to be the ones who have to determine which outweighs the other. All right. I am going to go through the mitigating circumstances as Mr. Hebert did on the aggravating circumstances. I cannot deny, of course, that one of the mitigating circumstances is no significant history of prior criminal activity. Well, in spite of all that institu-

tionalization, it's obviously not true. There are convictions. You are going to have it before you to consider. There is, in fact, a history of criminal activity. He was not rehabilitated obviously. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. He did testify that he was drinking alcohol and, in combination with the alcohol, smoking marijuana cigarettes. He testified to you that at least at or during the actual slaying that he was highly excited, highly nervous; that he can't even recall what the details of what happened. I submit to you that if you listen carefully to that tape recording although prior to

leading up to the events of describing the actual slaying, there was a lot of detail about names and times and places and roads and things like that. When he actually got down to what happened it suddenly got very blank. I submit to you that that is evidence going towards the Defendant's state of mind at the time. All right. The victim was a participant in the Defendant's conduct or consented to the act. I agree with the State there. That is not in issue here. The Defendant was an accomplice in the capital felony committed by another person and his participation was relative minor. There is no evidence going directly to that point. The Defendant acted under extreme duress or under substantial

domination of another person. I think there is some interesting issues that were brought up at the trial. The State wants you to believe, although the Court instructed you that no one else was on trial and that if you found him guilty then you should, -- if you believe he was guilty you should return your verdict along those lines. The State's version at least was that Raymond Stone acted alone in committing this death. Ladies and Gentlemen, I suggest to you that there are pieces of evidence, there are pieces of testimony in this trial, that raise some doubt as to whether or not that is actually true. Whether or not Raymond Stone was alone in this act. I mentioned in my Closing Argument that in

physical statute Jacqueline Joann Smith was considerably larger in fact in bulk and weight when she was alive than Raymond Stone. His testimony was he hit her and knocked her unconscious and he somehow, although he had a dead weight, somehow was able to get her over the bridge all by himself. And if the State wants you to believe that there was a struggle at the car and that is where she was knocked out -- although that is inconsistent with his slapping her over in Union County. I am a little confused about how they want you to get the chronology or how the State expected you to get that chronology. The question you have got to resolve insofar as determining whether or not -- because I think if he had

acted alone that is more aggravating than if he acted with someone else. The State wanted you to believe that he intercepted before she ever got home and yet there is the question of the wallet. How did that wallet get back to the house? He put on some rebuttal witnesses which tried to shed some doubt on the two women who stated -- as I understood their testimony, they were quite certain that the night before they saw Jacqueline Joann Smith with that wallet. Insofar as Mr. Hebert's comments about the number of states that have reenacted the death penalty since that Furman Decision of the Supreme Court of the United States, he passed over another important thing. Since he brought it up, I think it is important for

me to make in my closing comments and that is this; he is right. The Furman Decision did not absolutely rule out the death penalty. You are not here today to decide that issue. That issue is still before the Supreme Court of the United States and it is going to be passed on some time in the near future. You are here on a very realistic real case. You have found a man guilty of murder. You have now got to make a recommendation to the Court of what kind of sentence he is going to get. Is he going to get the death penalty or is he going to get a life sentence with a mandatory twenty-five years. Ladies and Gentlemen, this was not a mass murder. This was not a torture murder. You have found it was a murder. It's a

shame. As the polygraph expert said in the testimony that was read from his deposition, you can't bring her back. It's all over. I think that's important to consider by the way, Ladies and Gentlemen, that the Defendant did, in fact, make a confession. You heard it. He told how he did it. He told it to law enforcement officers. I think what you have got here is a man who grew up in an atmosphere without love. Without a family. He grew up in institutions which because of their size and because of the funding and problems they had are cold places. Are places where a child in those formative, important formative years, cannot get the type of care and training and education that is needed. He has exhibited to you no

doubt and to other courts that he is not fit to have his freedom and walk the streets. He is a danger because of his prior history and his activity. The question then becomes, is it going to be necessary to do away with him? I think that under the circumstances although it was a slaying and it took away a mother from her children that under the statistics and it is a shame that the homocide (sic) rate in the United States and the State of Florida is constantly on the rise. No one seems to have an answer to that. But what you have got to decide is, was this in effect such a horrible offense that his life must be taken away or are there circumstances, mitigating circumstances which make it

believable to you that the proper sentence would be a life sentence under the statutes of the State of Florida. I ask you, please, to consider everything we have said. Pass it over individually. Pass it over together when you go and make your verdict. Once this is done we are through here but Raymond Stone has got -- is going to be faced with one or two things. Either he is going to leave here knowing that it is the recommendation and finally the decision of the Court that he will be put to death or knowing that he is going to have to sit through prison for twenty-five years and cogitate his activities and that before he has any chance of ever being out and that is up to the Probation and Parole Commission, he

will be an old man. Thank you, Ladies and Gentlemen.

THE COURT: Ladies and Gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the Defendant for his crime of Murder in the First Degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law which will not be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating

circumstances found to exist.

Your verdict should be based upon the evidence (which you have heard while trying the guilt or innocence of the Defendant and evidence) which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

(A) That the crime for which the Defendant is to be sentences (sic) was committed while the Defendant was under sentence of imprisonment;

(B) That at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another capital offense or of a felony involving the use or threat of

violence to some person;

(C) That the Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons;

(D) That the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

(E) That the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from

custody;

(F) That the crime for which the Defendant is to be sentenced was committed for pecuniary gain;

(G) That the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(H) That the crime for which the Defendant is to be esntenced was especially heinous, atrocious or cruel, "heinous" means extremely wicked or shockingly evil, "atrocious" means outrageously wicked and vile, "cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

If you do not find that there

existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence to life imprisonment.

Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist, the mitigating circumstances which you may consider, if established by the evidence are these:

(A) That the Defendant has no significant history of prior criminal activity;

(B) That the crime for which the Defendant is to be sentenced was committed while the Defendant was

under the influence of extreme mental or emotional disturbance;

(C) That the victim was a participant in the Defendant's conduct or consented to the act;

(D) That the Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor;

(E) That the Defendant acted under extreme duress or under substantial domination of another person;

(F) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(G) The age of the Defendant at

the time of the crime.

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be wholly

disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given to you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based on

these considerations, you should advise the Court whether the Defendant should be sentenced to life imprisonment or to death.

In these proceedings it is not necessary that the verdict of the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury.

Should a majority of the jury determine that the Defendant should be sentenced to death, you should recommend an advisory sentence as follows: "A majority of the jury advise and recommend to the Court that it impose the death penalty upon the Defendant, Raymond R. Stone."

On the other hand, if, after considering all the law and the evidence touching upon the issue of

punishment, a majority of the jury determine that the Defendant should not be sentenced to death, then you should render an advisory sentence as follows: "A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the Defendant, Raymond A. Stone."

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment. You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and dated and returned to the Court.

You will be given a form verdict. I said Raymond A. Stone. I meant to say Raymond R. Stone. I want to make sure the indictment says Raymond R.

MR. DUNHAM: It does, Your Honor.

THE COURT: All right. Today is the eighteenth day of July and there is a line on the two different advisory sentences that I have already read to you and an X for you to place in the proper one when at least seven or more of you have found that to be the recommendation of the jury. You may now retire to deliberate your verdict.

(Thereupon, the jury retired and the following proceedings were had:)

THE COURT: Now, Court is still in session. Mr. Bailiff, as I understand it both the State and the Defendant has requested that the charge of the Court to the jury be delivered to the foreperson. Just knock on the door and hand that -- had (sic) them these charges. That is correct, is it not, Gentlemen?

MR. HEBERT: Yes, sir.

MR. DUNHAM: That is correct, Your Honor.

THE COURT: All right. Now, the door is closed. Did you want to place any objections on the record in respect to the first argument that you made about the crime being committed while the Defendant was under sentence?

MR. HEBERT: Judge, before doing that, there were some pieces of evidence introduced during the testimony and would ask that as in the trial these exhibits be taken to the jury for their consideration as evidence.

THE COURT: Well, I will call them back in and tell them that if they want it they can have it. It's not a matter of necessity.

MR. HEBERT: During the regular course of the trial at the conclusion of the evidence the Court --

THE COURT: It is not necessary that the Court do that.

MR. HEBERT: I know it is not. I don't really ask that they be

brought in and advised. I think we can agree and I think Counsel for the Defense has no objection that this evidence produced at this hearing be taken in the jury room or do you, Gary?

MR. DUNHAM: I have no objection, Your Honor.

THE COURT: All right, Mr. Bailiff, hand to the -- knock on the door and just hand these items of evidence -- make sure that there is not any more.

MR. DUNHAM: Your Honor, --

THE COURT: Let him close the door. Now, make your objections.

MR. DUNHAM: Thank you, Your Honor. My objection -- referring, of course, to Florida Statute 921141

(sic), 5A. That is the first aggravating circumstance listed under the statute, Mr. Hebert's argument was that he felt he had a right to either put in evidence and/or argue going to 5A. As I understand it, since there was a capias out for the return of the Defendant to finish his sentence under the Division of Corrections of the State of Florida based on a reversal in the Federal Court, that he was at the time the murder was committed under sentence of imprisonment. My objection is to any evidence or any comment going to that particular aggravating circumstance. I don't believe that that is what the Legislature intended in the statute. I don't think the plain meanings of the words indicate

that. It says under sentence of imprisonment. The man, I don't think anyone can doubt, at the time was a free man. He had been released under a writ of habeas corpus by a Federal Court. He was not on probation. He was not on parole. He was not an escapee. He was legally out. I maintain that he was not again under sentence of imprisonment until the time he was actually made aware of it. I don't think that is a technical point. The whole thing is, every individual, of course, under our constitutional system has certain rights to appeal. He did, in fact, on his sentence that he was originally serving, appeal. Based upon that appeal through a lawful order of the Court he was released and he was a

free man and I, therefore, think that any argument going toward A, is improper and that the State cannot show that he was under sentence of imprisonment at the time under the circumstances.

THE COURT: As I understood, Counsel, from the testimony of the Defendant, Mr. Stone, he had been sentenced from Volusia County that last time. Now, after whatever appeal which was nothing in the record that indicates what he did, he finally filed a petition in the United States District Court which for the writ of habeas corpus, the writ was issued and the trial court ordered his release. That was sustained in the Circuit Court of Appeals certiorari or appealed back to the United States Supreme Court

and the United States Supreme Court reversed the Fifth Circuit Court of Appeals and the District Court and that happened -- that happened in April of 1970.

MR. HEBERT: '74.

THE COURT: '74. The offense alleged here was in August of '74. The mandate had not gotten down through all of its course and order for rearrest wasn't entered until a few days after the offense and that is what he was brought back from Missouri on. You have it in the record for your objection and I will permit the objection and consider it which I had already told you what the ruling was. The objection was going to be overruled.

MR. HEBERT: Your Honor, since the record has now shown an argument on the part of the Defense, could I for the purpose of helping my brethren in the Attorney General's Office also make a remark on the record to support my position?

THE COURT: Okay.

MR. HEBERT: It is the position of the State that the not only clear but exact wording of 921.141 5A is that the capital felony was committed by a person under sentence of imprisonment. While defense attorney's arguments are that the Defendant was not in jail at the time this crime was committed, under escape at the time this crime was committed, under parole at the time this crime was committed, there is

no doubt that the document which is entitled Order from the District Court entered into evidence shows that on April the eighth, 1974, the Defendant was under sentence of imprisonment. That is the purpose of this aggravating circumstance. Not only to deal with those prisoners who are incarcerated in a prison who commit crimes; but also, to create a category or classification of people who are more dangerous to society than others. That category of person under sentence includes those people who have escaped, those people who are on parole and those people for what other reason are outside of the prison but still under a sentence of imprisonment. Therefore, still in that category of dangerous to society, period. Thank you.

THE COURT: All right. Now, officers that have this Defendant in custody, do you wish to retire with him. I want you to do so before I release the other people in the audience.

MR. DUNHAM: Your Honor, I have -- I don't know whether it requires the Defendant's presence but I have filed with the Court, obviously for the purposes of perfecting an appeal, a motion for new trial.

THE COURT: Well, I don't think that that would be proper for me to consider until after the pronouncement of sentence.

MR. DUNHAM: I could have moved for a motion for new trial orally at the time the jury returned its verdict.

THE COURT: Yes. I think that's right.

MR. DUNHAM: I was trying to save the Court time. We are here. We are together. I have no new arguments to make. The arguments are those that were made at trial and the grounds are listed in the motions. I was just hoping to get things --

THE COURT: All right. Let's get rid of that.

MR. HEBERT: I understand that Mr. Dunham's statement is that the motion he has filed contains no new material and it has not been argued and that the arguments which he has previously made, he stands on now.

MR. DUNHAM: That is correct.

MR. HEBERT: So the State's position would be the same as those already argued in the case and I would hope and believe that the Judge's ruling would remain the same. So, really, all you are asking for is almost --

THE COURT: The motion for --

MR. HEBERT: A technical ruling today.

THE COURT: The motion for new trial is denied.

MR. DUNHAM. It is not a technical ruling. I still believe my arguments are legally correct.

THE COURT: I understand.

MR. DUNHAM: I am not conceding that but there is nothing new that I have to offer.

THE COURT: My ruling is based upon what I consider to be the facts that are in evidence and the law applicable thereto. The motion for new trial is and the same is hereby denied. If you'll bring it over I will put it in writing even though it is done in open court.

MR. DUNHAM: I will drop it over. As to all six? There is six grounds in the motion. I will just put denied as to all six counts -- all six grounds.

THE COURT: All right.

MR. DUNHAM: Your Honor, I have one other motion before the Court recesses, if I may. I spoke to the Court about it briefly. I would like to do it at this time. The motion is going to be that regard-

less of what the jury -- what advisory opinion the jury makes, it came to my attention only last week and we've only had a week to prepare to the Court at this time, I would. My motion is basically a motion to continue sentencing. The reasons are these. It's already been put into the record, of course, that in 1970 the Defendant was convicted of two counts. As I understand it of a crime -- the statute then was called crime against nature. This is, of course, a sexual offense to begin with but it also came to my attention and I have had some verification by telephone that at that time the Defendant was declared a mentally disordered sex offender under Section 917 of the Florida Statutes. Florida Statute 917.14

says that the Court may adjourn the trial or suspend a sentence and certify hearing for examination to determine whether the person is a mentally disordered sex offender if, A, the crime -- the person has been charged with a non-capital crime or has been convicted of any crime whether or not the crime is a sexual offense.

MR. HEBERT: Gary, maybe I can save you some time. I can stipulate that for whatever purpose you wish to submit those past records, I have no objection to the Court reviewing those. I do not concede that those records show that his state of mind at the time of this crime was something like insane or dillusioned or any other way affected. For the purpose of whatever reason you wish

to give to the Judge in his consideration, I have no objection.

MR. DUNHAM: Well, my reasons are twofold. Number one, I think it's important since there has been apparently some psychiatric determination and I think that is valuable for the Court in determining because the Court has the final decision to make. I think it would be valuable to the Court if we could get those records and make it available to the Court in determining sentencing. But, secondly, if, in fact, I can show -- when I can get ahold of the appropriate records, that he has in the past -- well, it's already part of the record, that he has been convicted of a sexual crime; but, secondly, that if in the past he

indicates that he was declared a mentally disordered sex offender, the Court then can determine that if there is probable cause to believe he falls within this classification, the Court then has the authority to appoint psychiatrist to determine if he falls within the category at this time and a hearing and all under the statutes are to be held and the reason I am bringing this up is because I was concerned about whether or not it, in fact, applied to a capital offense. As I understand the statute if, in fact, he is declared a sex offender the Court then has the authority to send him to a mental hospital until such time as the doctors say he is cured in quotes and unquotes. I am not sure what terms they use. Then he can

come back for sentencing. If he has been declared a sex offender in the past and has been convicted of sexual crimes, I maintain if I can get these records and is what I am asking for, time to get the records both for the Court's consideration in making a final determination but also for determining whether or not he at this time falls under this statute. 917.23 says that the provisions of this chapter cannot apply to a person charged with a capital offense but charged -- but it goes on to say, but shall apply to a person convicted of a capital offense. So, we have here a case of a man who has been, in fact, convicted of a capital offense. There is indication which if I -- like I say, if I had time to get

that certified copies of the records up here, I could present it to the Court. That is what I am asking for at this time.

THE COURT: That part of your motion is granted. If the jury recommends the death penalty the Court will continue this case to some reasonable time.

MR. HEBERT: Judge, if that is the disposition of the Court, I also would like to present additional information to the Court which was not presented to the jury. The Defendant, himself, testified to being in Boonestown, the juvenile facility in Missouri, at the age of twelve. He was there for the purposes of committing a crime. In every case that I am aware of for

sentencing under B&E or grand larceny or any other offense, the Court receives as part of its confidence, a presentence investigation. The juvenile record of the Defendant -- I have been hesitant to present any evidence at all as to the juvenile record of this Defendant before the jury. In abundance of caution since I had the other conviction already certified, I relied on them and stayed away from the juvenile record. I have with me certain evidence of that incarceration of the Defendant and the records relating thereto and the reason for him being there which directly, I think, affects this case and sentencing because the situation in that case as shown by these records was that at the age of

twelve he along with his brother had drowned an eight year old boy by tying him with ropes and throwing him in a river. Those records, therefore, I submit to the Court are relevant for the Court's consideration in sentencing and I have those here and I present them to the Court now or if you would like me to make copies for Mr. Dunham I would be happy to do that before giving them to the Court for its consideration.

THE COURT: Why don't you give me those when he presents those others.

MR. DUNHAM: I would appreciate having copies.

THE COURT: All right. I want most of us to get on out of the court room and let the Bailiff -- go ahead now and take the Defendant.

(Thereupon, the Defendant was taken from the room.)

THE COURT: Now, I am going to excuse -- the Court is now going to be in recess. Don't any of you in the audience come inside here -- inside the rail here except the lawyers and the officials of the Court and the Bailiff.

(Thereupon, Court was in recess.)

(Thereupon, the jury returned to the box at twelve o'clock noon and the following proceedings were held:)

THE COURT: Ladies and Gentlemen of the jury, have you reached a verdict?

THE FOREPERSON: Yes.

THE COURT: Hand the verdict to the clerk, please.

Mr. Clerk, take the verdict back to the jury and have the foreman date it. Today is the eighteenth day of July.

Harken to the publishing of your verdict.

THE CLERK: State of Florida versus Raymond R. Stone, Defendant. A majority of the jury advises and recommends to the Court that it impose the death penalty upon the Defendant, Raymond R. Stone in Lake Butler, Union County, Florida, this eighteenth day of July, A.D., 1975, signed Thomas G. Mobley, foreperson.

THE COURT: Ladies and Gentlemen of the jury, it is necessary that we poll you to make absolutely sure

that the advisory sentence which you have just returned is that upon which a majority of you agree. That means, of course, at least seven. We are going to ask each of you, individually, concerning this; but you are instructed that it is not necessary that you state how you personally voted or how any other person voted, but only if the advisory sentence as read was correctly stated. Now, the following question is addressed to each of you, as well as the one I name respectfully. I will go down the list. Do you, Mr. Thomas G. Mobley, agree and confirm that a majority of the jurors joined in this advisory sentence which you have just heard read by the Clerk?

MR. MOBLEY: Yes, sir.

THE COURT: Do you, Mary E. Noegel?

MRS. NOEGEL: Yes.

THE COURT: Do you, Frances E. Kitler?

MRS. KITLER: Yes.

THE COURT: Do you, Thomas E. Rymer?

MR. RYMER: Yes.

THE COURT: Do you, Michael A. Dobbs?

MR. DOBBS: Yes.

THE COURT: Do you, Leroy Dillon?

MR. DILLON: Yes.

THE COURT: Do you, Donald J. Rosier?

MR. ROSIER: Yes.

THE COURT: Do you, Loma Stephen?

MRS. STEPHEN: Yes.

THE COURT: Do you, Joyce Norman?

MRS. NORMAN: Yes.

THE COURT: Do you, Billy Ray Foister?

MR. FOISTER: Yes.

THE COURT: Do you, Cassie Mae Starling?

MRS. STARLING: Yes.

THE COURT: Do you, Jean N. Johnson?

MRS. JOHNSON: Yes.

THE COURT: Thank you, Ladies and Gentlemen.

The Court has already granted a motion for a continuance of the pro-

nouncement of sentence that the Court will impose in this case. You, Ladies and Gentlemen, are discharged from further responsibility in this case. The jurors have sacrificed a lot of time and a great deal of energy and thought and emotion when they have to discharge such heavy responsibility in a capital case. Thank you for your services. You may be discharged. You may leave.

MR. HEBERT: May I ask that the spectators be told to remain until the jurors are allowed to clear the courthouse?

THE COURT: Yes.

(Thereupon, the jurors were excused.)

THE COURT: The Court will be in recess.

(Thereupon, the hearing was adjourned.)

STATE OF FLORIDA

COUNTY OF ALACHUA

I, Elaine S. Adams, Official Deputy Court Reporter, do hereby certify that the Aggravation/Mitigation Hearing in the case of the State of Florida vs. Raymond R. Stone was held on July 18, 1975; that I was authorized to and did report in stenograph and tape recorder the proceedings and evidence of said hearing, and the foregoing pages, number 1 through 81, inclusive, constitute a true and accurate transcription of said proceedings.

In witness whereof, I have hereunto affixed my hand this 25th day of August, A.D., 1975.

/S/ ELAINE S. ADAMS
OFFICIAL DEPUTY COURT REPORTER
EIGHTH JUDICIAL CIRCUIT.

My Commission Expires 12/26/77